Supreme Court, U. S.
FILED
AUG 22 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-280

DONALD L. WASHUM, an individual, HAYWOOD L. WASHUM, d/b/a LOS ANGELES-YUMA FREIGHT LINES, SVENSSON FREIGHT LINES, INC.,

Appellants,

v.

UNITED STATES OF AMERICA, et al.,

Appellees.

On Appeal from the United States District Court for the District of Arizona

JURISDICTIONAL STATEMENT

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August 22, 1975

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment in the United States District Court for the District of Arizona entered on June 18, 1975, affirming orders of the Interstate Commerce Commission, and submit this Statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion and judgment of the District Court for the District of Arizona, not yet reported, appears in Appendix A hereto. The opinion of the Interstate Commerce Commission, reported at 116 M.C.C. 158, appears in Appendix B hereto. The 1974 corrected order of the Interstate Commerce Commission, unreported, appears in Appendix C hereto. The 1969 decision of the District Court for the District of Arizona, reported at 299 F. Supp. 712, *aff'd*, 396 U.S. 18, relied upon by the court below, appears in Appendix D hereto. The 1968 order of the Interstate Commerce Commission, reported at 104 M.C.C. 838, appears in Appendix E hereto.

JURISDICTION

The suits were brought under 28 U.S.C. § 1336, to set aside orders of the Interstate Commerce Commission. The judgment of the District Court was entered on June 18, 1975, and notice of appeal was filed in that court on June 25, 1975. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Florida East Coast R. Co.*, 410 U.S. 224 (1973); *United States* v. *Contract Steel Carriers*, 350 U.S. 409 (1956); *United States* v. *Capital Transit Co.*, 325 U.S. 357 (1945).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission, in the absence of inadvertence, willful misrepresentation, or fraud, has the power to revoke a certificate of registration, once issued under 49 U.S.C. § 306(a)(7)(A), without following the jurisdictional prerequisites of 49 U.S.C. § 312(a).

2. Whether the doctrines of res judicata and collateral estoppel precluded appellants from contesting the merits of a decree of the Interstate Commerce Commission which revoked a motor carrier certificate by action not within the statutory powers granted to that federal agency by the Interstate Commerce Act.

3. Whether the Interstate Commerce Commission violated the Administrative Procedure Act, 5 U.S.C. § 557(c), in failing to include a statement of findings and conclusions, and the reasons and basis therefor, on the material issue of whether extensive motor carrier operations under temporary authority pursuant to 49 U.S.C. § 310a(a) supported a grant of an application for permanent operating rights.

STATUTES INVOLVED

Title 5, United States Code, Section 557(c); Title 49, United States Code, Sections 306(a)(7)(A), 310a(a), and 312(a), are set forth in Appendix F hereto.

STATEMENT OF THE CASE

Appellant Donald L. Washum, the owner of appellant Svensson Freight Lines, Inc. (Svensson), is the son of appellant Haywood L. Washum who owns and operates Los Angeles-Yuma Freight Lines. Svensson has been a motor common carrier operating over interstate routes in Arizona for approximately forty years. Prior to 1962, Svensson functioned under an exemption then found in the Interstate Commerce Act. In that latter year the law changed, 49 U.S.C. § 306(a)(7)(A) was enacted, and Svensson was required to seek a certificate of registration in order to continue its prior interstate operations. Svensson duly sought such a certificate by submitting an application to the Interstate Commerce Commission (ICC). In that application Svensson indicated that it shared

facilities with and leased trucks from Los Angeles-Yuma Freight Lines which is a carrier engaged in operations outside the State of Arizona.

On the basis of that application the ICC issued a certificate of registration to Svensson in 1964 which did no more than allow that carrier to continue the same operations in Arizona which had been conducted for many years. In 1966 a number of competing motor carriers operating in and around Arizona filed a complaint at the ICC against appellants alleging that the 1964 certificate had been improperly issued to Svensson since that company and Los Angeles-Yuma Freight Lines were in common control as of October 15, 1962, and thus Svensson was not entitled to a certificate of registration under 49 U.S.C. § 306(a)(7)(A). Svensson countered by denying the charges, and by filing applications for approval of common control and for a certificate of public convenience and necessity.

The ICC disagreed with Svensson on all matters. The federal agency denied the two applications, found that common control existed on the critical statutory date between Svensson and Los Angeles-Yuma Freight Lines, primarily because of a father-son relationship and that the companies shared a terminal and equipment, and invalidated Svensson's certificate of registration (104 M.C.C. 838). No mention was made of the fact that the application of Svensson for the certificate of registration, granted by the ICC in 1964, clearly revealed that Svensson and Los Angeles-Yuma Freight Lines shared a terminal and equipment. Svensson appealed to the Arizona District Court contending only that substantial evidence did not support the Commission denials of the applications for control and for a certificate. The Arizona Court affirmed the federal agency (299 F. Supp. 712). On appeal this Court granted a motion to affirm the Arizona Court decision (396 U.S. 18).

Within a short time thereafter the Commission granted Svensson temporary authority pursuant to 49 U.S.C. § 310a(a) to continue its interstate operations during the prosecution of new applications by Svensson for permanent operating rights and control. Again the ICC disagreed with Svensson, this time finding the carrier unfit to receive a certificate based in substantial part upon the prior conclusion that it had performed interstate operations with an improper and invalidated certificate (116 M.C.C. 158). Also, the ICC failed to consider to any known degree the significance of the extensive operations by Svensson under temporary authority upon the issues of fitness and need for the permanent certificate (Appendix C hereto).

Again the matter was appealed to the Arizona District Court. Appellants also appealed that portion of the prior ICC decision (104 M.C.C. 838) which had invalidated the certificate of registration. Appellants argued below that the actions by the ICC in cancelling the certificate of registration in the first case, and in relying upon that cancellation to buttress conclusions in the second case, were in excess of the statutory jurisdiction of the ICC. It was also contended below that the ICC in the second case violated the Administrative Procedure Act in that the federal agency failed to include a statement of findings and conclusions, and the reasons and basis therefor, on the material issue of whether operations under temporary authority warranted a finding of fitness and a grant of the Svensson application.

The court below held that under the doctrine of res judicata the court could not consider an attack upon the second ICC decision involving issues raised or which should have been raised in the prior ICC adjudication. The court also found that appellants' attack on the second ICC decision regarding the issue of temporary operations must fail. The court stated that, while the

Administrative Procedure Act mandates findings on all material issues, it was questionable that temporary operations were material at the time the second decision was rendered.

THE QUESTIONS ARE SUBSTANTIAL

I. A FUNDAMENTAL PRINCIPLE OF TRANSPORTATION REGULATION HAS BEEN ABANDONED BY THE ICC CONTRARY TO STATUTORY LAW AND TO CONSISTENT DECISIONS OF THIS COURT WHICH ENCOURAGE THE STABILITY OF OPERATING CERTIFICATES ISSUED BY FEDERAL AGENCIES

One of the overriding and fundamental principles of transportation regulation is the principle that carriers should be permitted stability of route; that is, that their investment in operations be protected. Carriers, whether they be rail, water, motor or air carriers, expend millions of dollars each year acquiring new equipment so that they may better serve the shipping and traveling public. These carriers would be reluctant to invest such large amounts of capital if they were not assured that their investment would be protected against agency intervention. One of the tools used by Congress to provide carriers with stable operations has been the enactment of legislation stabilizing the operating rights of carriers.

Once a carrier is issued a certificate and commences operations, with the concomitant investment in facilities and personnel, Congress has seen fit to protect the carrier's investment by narrowly limiting the power of the appropriate regulatory agency to suspend or revoke the outstanding certificate. This Court has long recognized this fundamental principle that the outstanding operating certificates of carriers are endowed with a special status in order to promote stable and secure operations. This Court has stated, with respect to the Interstate

Commerce Commission, that in "order to provide stability for the operating rights of carriers, Congress placed within very narrow limits the Commission's power to suspend or revoke an outstanding certificate." *Castle* v. *Hayes Freight Lines, Inc.*, 348 U.S. 61, 63 (1954). Also, as to air carriers, this Court has said, "It is clear from the statements of the supporters of the predecessor of the Aviation Act—the Civil Aeronautics Act of 1938—that Congress was vitally concerned with what has been called 'security of route'—i.e., providing assurance to the carrier that its *investment in operations* would be protected insofar as reasonably possible. And there is no other explanation but that Congress delimited the Board's power to reconsider its awards with precisely this factor in mind . . . ." *CAB* v. *Delta Air Lines*, 367 U.S. 316, 324 (1961).

For these same reasons this Court, the lower federal courts, and the ICC have long recognized that the exclusive power and jurisdiction of the ICC to revoke motor carrier certificates is created and defined solely in Section 212(a) of the Interstate Commerce Act, Title 49, United States Code, Section 312(a). *See United States* v. *Seatrain Lines*, 329 U.S. 424 (1947); *CAB* v. *Delta Air Lines*, 367 U.S. 316, 333, footnote 15 (1961). This Court commented in the *Castle* case, *supra*, that "No certificate is to be revoked, suspended or changed until after a hearing and a finding that a carrier has *willfully* failed to comply with the provisions of the Motor Carrier Act or with regulations properly promulgated under it." (348 U.S. 63-64, footnote omitted).

In *Watson Bros. Transportation Company* v. *United States*, 132 F. Supp. 905 (D. Neb. 1955), aff'd 350 U.S. 927 (1956), a three-judge District Court ruled: ". . . The only statutory authority for the suspension, change, or revocation of such a certificate by the Commission is contained in Section 212(a) . . . . Since the later order was issued without notice and hearing and for reasons

other than those stated in Section 212(a), it is invalid. . . . the order . . . is an attempt made contrary to Sec. 212 to revoke and change a certificate duly issued." (132 F. Supp. 909).

The ICC itself has ruled that once a certificate of registration is issued it cannot be invalidated unless the procedures of 49 U.S.C. § 312(a) have been followed. *All American Transpor', Inc.—Control and Merger*, 109 M.C.C. 243 (1969); *Smith Bros. Revocation of Certificate*, 33 M.C.C. 465 (1942).

The only exceptions to this strict principle of law that motor carrier certificates can be revoked only pursuant to Section 312(a) involve situations where the certificate was obtained through willful or intentional misrepresentation, *Service, Inc., Common Carrier Application*, 49 M.C.C. 724 (1949); *Sawyer Transport, Inc.—Purchase—R. C. Wilson*, 104 M.C.C. 233 (1967), or inadvertant error or mistake, *American Trucking Assns.* v. *Frisco Transp. Co.*, 358 U.S. 133 (1958), *Lund* v. *United States*, 319 F. Supp. 552 (D. Colo. 1970).

Thus, even though a motor carrier certificate can be revoked only pursuant to Section 312(a), the ICC has revoked the certificate of registration issued to appellant Svensson without complying with the statutory procedure set out in Section 312(a). That section provides that a certificate may be revoked by the ICC in a complaint proceeding for "willful failure" to comply with the law. The proviso to the section states that ". . . no such certificate . . . shall be revoked . . . unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission . . . ." The ICC has never initiated a section 312(a) proceeding, has never made a finding that Svensson was guilty of a "willful failure" to comply with the law, and never gave Svensson the opportunity, at least thirty days by statute, to conform to the law.

In *All American Transport, Inc.—Control and Merger*, 109 M.C.C. 243 (1969), the ICC itself held:

> Since Congress did not specifically provide any other means of terminating certificates of registration, it seems to us that it intended such termination to be effected only by the procedures set forth in [49 U.S.C. § 312(a)] . . . which accords the holder the opportunity to demonstrate or achieve compliance prior to such termination . . . . A certificate of registration loses its validity during the period that common control with a multiple-state carrier exists, but if the situation is remedied, it is again in full force and effect—unless, of course, it had earlier been revoked by formal Commission order under [49 U.S.C. § 312(a)] . . . . The registration holder should be given the opportunity to demonstrate or achieve compliance prior to such termination or revocation. (109 M.C.C. 249).

Appellees will argue that the ICC had the power to terminate the certificate outside of Section 312(a) since no certificate should have been issued in the first instance. This is so, according to appellees, since the statute, 49 U.S.C. § 306(a)(7)(A), stipulates that a certificate of registration can only be issued to one not in common control with a multi-state carrier. That argument, however, if adopted by this Court, frustrates the overwhelming principle that certificates, once issued, shall remain stable. Overlooked by the court below and by the ICC are the facts that Svensson revealed a relationship with Los Angeles-Yuma Freight Lines in its original application and that, notwithstanding the revelation, the ICC granted the application, found that Svensson complied with the law, and issued the certificate in 1964. The ICC has in a number of cases followed the principle that certificates cannot be revoked simply because the federal agency should later discover that the grant was based on false but not fraudulent information. *Sawyer Trans-*

port, Inc.—Purchase R. C. Wilson, 104 M.C.C. 233 (1967); *Consolidated Freightways* v. *United Truck Lines, Inc.,* 53 M.C.C. 721 (1951); *Service, Inc., Common Carrier Application,* 49 M.C.C. 724 (1949).

This case represents an awesome power in the hands of the ICC—the power to reinvestigate at any time the basis for the issuance of a certificate and to declare the certificate to be invalid since the initial grounds for issuing the certificate were not sound. We believe that determination of this issue is of significant importance to the entire transportation industry which must know whether their present investments are subject to yet another regulatory threat. The ICC has here successfully nullified the impact of Section 312(a) as a protective tool. This Court should not permit the safeguards of Section 312(a) to be debilitated by the federal agency.

II. THIS APPEAL INVOKES SIGNIFICANT INTERPRETATIVE AND POLICY CONSIDERATIONS IN THE APPLICABILITY OF THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL TO DECISIONS OF ADMINISTRATIVE AGENCIES WHOSE ACTIONS, CIRCUMSCRIBED BY ITS ENABLING STATUTE, ARE EXERCISED OUTSIDE OF THE POWER IT POSSESSES UNDER THAT STATUTE

The case on appeal to this Court represents a classic incidence of the doctrines of both res judicata and collateral estoppel being squarely in issue. To place this matter into perspective it is to be noted that appellants urged below that the revocation of the certificate in the first decision (104 M.C.C. 838) was in error as beyond the power of the ICC. Since the same parties and the same action are involved it was proper for the court below to have considered the applicability of res judicata. Something more, however, is involved. Appellants also urged below that the ICC improperly relied

upon the revocation of the certificate in making findings in the second decision (116 M.C.C. 158). Although the parties were the same on that portion of the appeal below, it is clear that the cause of action was different. The court below did not recognize that position and, accordingly, did not even rule on the applicability of the doctrine of collateral estoppel although the decision below did pay lip service to the phrase itself.

The early case of *Cromwell* v. *Sac County,* 94 U.S. 351 (1877), spells out the distinction between the two doctrines, or, as stated by this Court, between "the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand and its effect as an estoppel in another action between the same parties upon a different claim or cause of action." (94 U.S. 352). In the former case, states the Court, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action.[1] In the latter case, however, "the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." (94 U.S. 353). The Court concludes:

> In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. (*Ibid*).

The Court below in its terse treatment of the issue completely confused the impact of *Cromwell* on appellants' ability to argue the revocation question on the

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[1] As demonstrated, *infra,* latter cases of this Court have modified the "absolute bar" theory when dealing with questions of jurisdiction and overriding public policy.

merits. Appellants were attacking, *in a different cause of action*, the second decision of the ICC with respect to the adequacy of the ultimate finding on fitness. In reaching the determination in the second case that Svensson was unfit the ICC relied in substantial part upon the invalidity of the Svensson certificate from its inception. Appellants under the *Cromwell* criteria had the right to avoid the defense of collateral estoppel since the issue of the ICC's power to revoke the certificate had never been argued and decided upon. Thus, under *Cromwell*, this case should be summarily returned to the Arizona District Court for consideration on the merits of the issue regarding the adequacy of findings based on operations of Svensson under the revoked certificate.

Also, the decisions of this Court, with respect to both doctrines, reveal exceptions to the general rule, which warrant noting jurisdiction and delving more deeply into the issues by the present Court. An early case of this Court, *United States* v. *Walker*, 109 U.S. 258 (1883), set up an exception to the general rule when it held that the estoppel doctrines are inapplicable if the decision relied upon to justify the invocation of the doctrines was beyond the power conferred by statute and thus not within the jurisdiction of that tribunal. Likewise, the early case of *Hardin* v. *Jordan*, 140 U.S. 371 (1891), is significant. That case involved an action for ejectment to recover certain lands previously awarded to a third party by the government in administrative proceedings which had been contested by the plaintiff. This Court, initially recognizing the general rule of res judicata, concluded that the doctrine was inapplicable since "the Department had no jurisdiction to transfer the lands, and the attempted conveyance . . . is inoperative and void." (140 U.S. 400-401).

We submit that the early cases make it clear that administrative, as well as judicial determinations, made

without jurisdiction are void, and the existence of jurisdiction or authority to act is always open to inquiry. *Badger* v. *Cusimano & Co.*, 130 U.S. 39 (1889); *Doolan* v. *Carr*, 125 U.S. 618 (1887). Also, with respect to an order of the Interstate Commerce Commission this Court has held in *Piedmont & N.R. Co.* v. *United States*, 280 U.S. 469 (1930), that a litigant can always attack an order of the ICC which is issued beyond its jurisdiction.

Later cases of this Court have considered the estoppel doctrine and, consistent with the earlier decisions, have held that the decree of a court is subject to collateral attack when the ruling by that court was beyond its power and void. *Kalb* v. *Feuerstein*, 308 U.S. 433 (1940). Moreover, this Court refused to apply the doctrine of res judicata in *Mercoid Corp.* v. *Mid-Continent Invest. Co.*, 320 U.S. 661 (1944), when to do so would have been contrary to the public interest.

While the law remains somewhat unsettled regarding the applications of the doctrines there is some consistency in the view that estoppel will not preclude considering a question of jurisdiction on its merits where the issue had not been previously argued. Where an administrative agency has been delegated the power to grant and revoke certificates, admittedly, a difficult question arises as to which elements are of such importance that their presence is essential to the power of the agency to act, failing which its action is without jurisdiction. Justice Holmes summarized the nature of the question in *Fauntleroy* v. *Lum*, 210 U.S. 230 (1908), when he stated:

> No doubt it sometimes may be difficult to decide whether certain words in a statute are directed to jurisdiction or to merits, but the distinction between the two is plain. One goes to the power, the other only to the duty, of the court. Under the common law it is the duty of a court of general jurisdiction not to enter a judgment upon a parol promise made without consideration; but it has the power to do it,

> and, if it does, the judgment is unimpeachable, unless revised. Yet a statute could be framed that would make the power, that is, the jurisdiction, dependent upon whether there was a consideration or not. Whether a given statute is intended simply to establish a rule of substantive law, and thus to define the duty of the court, or is meant to limit its power, is a question of construction and common sense. (210 U.S. 234-235).

In the case at bar we submit that 49 U.S.C. § 312(a) is so framed that the very power or jurisdiction of the ICC depends on a finding of willful violation of the law, and the giving of a grace period to allow the willful violator the opportunity to remedy the defect. The ICC failed to accomplish these procedures below, and thus essential ingredients prerequisite to the powers of the ICC to act are missing. In those circumstances, the failure to comply with Section 312(a) deprived the ICC of its very power or jurisdiction to act and its defective decree was, therefore, void and subject to attack in the court below.

Nor should the doctrines of res judicata or collateral estoppel be enforced where they thwart the method devised by Congress for revoking motor carrier certificates. *See Denver Bldg. and Constr. Trades Council* v. *NLRB*, 186 F.2d 326 (D.C. Cir. 1950), *rev'd on other grounds*, 341 U.S. 675 (1951). In the administrative law context, the application of collateral estoppel or res judicata must remain flexible, especially in a case where the application would work a substantial injustice. *Lewis* v. *International Business Machines Corp.*, 393 F. Supp. 305 (1974). *Title* v. *Immigration and Naturalization Service*, 322 F.2d 21 (9th Cir. 1963). "*Res judicata* of administrative decisions is not encrusted with the rigid finality that characterizes the precept in judicial proceedings. . . . [W]hen traditional concepts of *res judicata* do not work well, they should be relaxed or

qualified to prevent injustice." *Grose* v. *Cohen*, 406 F.2d 823, 824-825 (4th Cir. 1969).

In the earlier *Washum* case (299 F. Supp. 712) the jurisdiction of the ICC to revoke the certificate of registration was never raised, was never briefed, and was never argued. Nevertheless, the district court below referred to the following language in the 1969 decision (299 F. Supp. 712) as supporting its position that the Section 312(a) procedural issue had in fact been adjudicated: "[W]e are satisfied that the Commission followed the law, and that its findings are supported by substantial evidence . . . ." (299 F. Supp. 713). The lower court's reliance upon this language is clearly misguided. This language does not refer to the issue of procedural jurisdiction. Rather, the 1969 court was merely referring to the fact that the ICC followed the substantive law on the substantive issues presented. Thus the situation in the instant case is analogous to the situation presented in *Grose* v. *Cohen* where the court refused to apply res judicata or collateral estoppel to a prior unappealed administrative decision. Since the Section 312(a) jurisdictional issue has never been decided by a court, the question of jurisdiction still remains for judicial determination. The question of administrative jurisdiction is always one for judicial determination. *Borax Consolidated* v. *City of Los Angeles*, 296 U.S. 10 (1935).

As to the binding effect of the decision of an agency which exceeded its jurisdiction, one lower court has stated: ". . . neither their decision nor the findings of fact with reference thereto have any binding effect. This necessarily follows because they are without authority to decide the dispute. It goes without saying that a decision of any court or other agency on a matter concerning which it has no jurisdiction has no binding effect whatsoever." *Utah Construction and Mining Com-*

pany v. *United States*, 339 F.2d 606, 609 (Ct. Cl. 1964), *aff'd in part, rev'd in part* 384 U.S. 394 (1966).

The court below held that res judicata barred appellants from raising the Section 312(a) revocation issue since the issue was raised or should have been raised in the prior 1969 adjudication, citing *Partmar Corp.* v. *Paramount Theatres Corp.*, 347 U.S. 89 (1954); *Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507 (1953); *Jackson* v. *Irving Trust Co.*, 311 U.S. 494 (1941). These cases are clearly distinguishable. They concern factual issues actually litigated in the prior adjudication. Such is not the case here. We are not concerned in the instant case with issues previously litigated. Nor are we concerned here with factual issues. Rather, we are concerned with the Commission's failure to comply with the jurisdictional prerequisites of Section 312(a) and, therefore, the Commission's failure to exercise proper jurisdiction. Since the Commission did not act under Section 312(a), it had no power to terminate the Svensson certificate. *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947).

Appellants contend that previous decisions of this Court, interpreting the doctrines of collateral estoppel and res judicata, are in conflict with the decision of the Arizona District Court. The Arizona Court has expanded the doctrine of res judicata to apply to subsequent litigation based on different causes of action. Likewise, it has expanded the doctrine of collateral estoppel to apply also to issues not previously litigated which could have been litigated. The court has clearly confused the two estoppel doctrines. These conflicts alone justify the noting of jurisdiction and plenary review of the issues. Likewise, the court below has applied the estoppel theories to preclude consideration of an important jurisdictional issue. Clearly, the results reached in this case were unintended by Congress in its enactment of 49 U.S.C. § 312(a), as

the numerous cited cases point out. All these anomalies created by the decision of the district court warrant noting of jurisdiction and reversal by this Court.

III. THE DECISION BELOW CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT AS TO THE PROPER EVIDENTIARY VALUE TO BE ACCORDED TEMPORARY AUTHORITY OPERATIONS

The ICC and the court below have refused to recognize the evidentiary weight to be accorded temporary authority operations when considering a permanent authority application. Pursuant to 49 U.S.C. § 310a(a) the ICC has the power to grant authority to carriers to conduct temporarily those operations permanently sought. These temporary operations are the best source of evidence to prove that public convenience and necessity require the carrier's services. The court below and the Interstate Commerce Commission, however, refused to consider the evidentiary importance of Svensson's temporary authority operations.[2] This refusal to consider Svensson's temporary authority operations is at clear odds with the United States District Court for the District of Minnesota in *Barrett Mobile Home Transport, Inc.* v. *United States*, 381 F. Supp. 1317 (D. Minn. 1973). In that case, the

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[2] A computer study of Svensson's operations for three years under temporary authority disclosed:

(a) 97.9 percent of Svensson's total traffic consisted of small shipments weighing 10,000 pounds or less

(b) of 25,000 freight bills analyzed, 83 percent of Svensson's total traffic was delivered in one day or less

(c) small and isolated communities in Arizona were served including those between Yuma and Phoenix, as well as those lying south of Yuma on the border

(d) Svensson had an average rate of growth in number of shipments of 50.6 percent and an average rate of growth in its tonnage of 95.7 percent.

carrier who had been operating under temporary authority argued to the court that the ICC had applied improper evidentiary standards in judging the weight to be accorded the temporary operations. The carrier claimed that the ICC had failed to consider the temporary operations in conjunction with other evidence of a need for service. The Minnesota court agreed with the plaintiff and concluded that "an incorrect evidentiary standard was applied as to . . . temporary operations in that there was a wrongful failure to consider such operations in conjunction with other evidence of a need for the proposed service." (*Id.* at 1328). Indicating how the Commission should treat evidence of temporary operations, the court in *Barrett* stated:

> The ICC should have considered the evidence as to Barrett's temporary operations in conjunction with all the other evidence adduced in determining whether Barrett's proposed service would serve a useful public purpose by fulfilling a public demand or need, whether Barrett had the ability to provide its proposed service, whether the public purpose could and would be served as well by the existing carriers and what the volume of traffic involved was, in addition to the effect of granting the proposed service on existing carriers' operations. This is especially true in view of the fact that in order to grant temporary authority under 49 U.S.C. Section 310a(a) there must be a finding that there is an 'immediate and urgent need' for such operations. (*Id* at 1329) (footnotes omitted).

The *Barrett* decision is in direct conflict with the Arizona Court. In the decision below, the court held that the temporary operations conducted by Svensson were not material at the time the 1972 Commission decision was rendered. The *Barrett* court, on the contrary, has ruled properly, in our view, that temporary operations must be considered in determining whether the public convenience

and necessity require the proposed service, whether the carrier is fit, willing and able, and whether existing carriers will be injured by the entry of a new carrier. The conflict between the decision below and the *Barrett* case justify the noting of jurisdiction and plenary review of the issues. These conflicts warrant resolution by this Court to ensure a uniform approach in the administration of the Interstate Commerce Act.

CONCLUSION

Appellants submit that the decision of the district court fails to recognize the Commission's lack of power to revoke a motor carrier certificate without following the jurisdictional prerequisites of 49 U.S.C. § 312(a). From this omission ensues a decision which contravenes the Congressional intent to accord motor carrier certificates a preferred status against revocation. The Court's decision creates a conflict as to the proper application of the doctrines of collateral estoppel and res judicata, and as to the proper evidentiary weight to be accorded temporary authority operations. The decision of the district court thus raises substantial questions of public importance which should be resolved by this Court to provide a basis for uniform application of the fundamental estoppel doctrines and for uniform application and fair administration of vital provisions of the Interstate Commerce Act.

Respectfully submitted,

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August 22, 1975

APPENDIX A

Judgment and Opinion of the U.S. District Court for the District of Arizona in Washum, *et al.* v. United States, *et al.*, Civil Action Nos. 74-450, 75-110, entered June 18, 1975.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

No. CIV 74-450 PHX-CAM

DONALD L. WASHUM, An Individual, HAYWOOD L. WASHUM, dba LOS ANGELES-YUMA FREIGHT LINES, SVENSSON FREIGHT LINES, INC.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
Defendants.

No. CIV 75-110 PHX-CAM

DONALD L. WASHUM, An Individual, HAYWOOD L. WASHUM, dba LOS ANGELES-YUMA FREIGHT LINES, SVENSSON FREIGHT LINES, INC.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
Defendants.

MILNE TRUCK LINES, INC., NAVAJO FREIGHT LINES, INC., O-N-C FREIGHT SYSTEM, THUNDERBIRD FREIGHT LINES and WESTERN GILLETTE, INC.,
Intervening Defendants.

JUDGMENT

Before TRASK, Circuit Judge, EAST and MUECKE, District Judges

Plaintiffs Donald L. Washum, Haywood L. Washum dba Los Angeles-Yuma Freight Lines, and Svensson Freight Lines have brought these three-judge panel actions pursuant to 28 U.S.C. § 2325 seeking injunctive relief against certain orders of the Interstate Commerce Commission (hereinafter Commission). Intervening defendants are motor carriers authorized by the Commission to conduct business in the locations involved here and who have opposed plaintiffs in prior Commission proceedings.

This matter first came before the Court on June 27, 1974, when plaintiffs filed civil case No. CIV 74-450 PHX-CAM. A restraining order was issued on July 5, 1974, by the judge to whom the case had been assigned which allowed plaintiffs to continue trucking operations pending conclusion of the proceedings, and a three-judge panel was subsequently scheduled to convene on April 28, 1975. On September 19, 1974, during the pendency of CIV 74-450, plaintiffs filed a petition with the Commission requesting a waiver of procedural rules and a rehearing on their case. On January 3, 1975, an appellate branch of the Commission waived procedural rules, allowed filing of the petition, and proceeded to deny the petition.[1] On February 28, 1975, plaintiffs filed a second civil case No. CIV 75-110 PHX-CAM attacking the Commission actions on the rehearing decision. By stipulation and order of this Court, the two cases herein were consolidated for purposes of argument and decision.

I.

The history of this matter goes back as far as December 26, 1956, when Plaintiff Haywood L. Washum dba Los Angeles-Yuma Freight Lines was issued a certificate of public convenience and necessity by the

[1] Order dated December 30, 1974.

Commission.[2] On June 10, 1964, Plaintiff Svensson Freight Lines, Inc. (partly owned by Plaintiff Donald L. Washum, son of Haywood L. Washum) was issued a certificate of registration. On August 12, 1966, ten motor carriers filed a complaint with the Commission alleging that the three plaintiffs were under common control and that Svensson's June 1964 certificate had been terminated as a matter of law.[3] Svensson denied the motor carriers' allegations and simultaneously filed for a certificate of public convenience and necessity[4] and applied to purchase Los Angeles-Yuma Freight Lines.[5] The complaint of the motor carriers and the two applications of Svensson were considered by the Commission and all rulings were unfavorable to Svensson both initially and on appeal.[6] The effect of the rulings was stayed, however, until review and affirmance by a three-judge court in *Washum* v. *United States*, 299 F.Supp. 712 (D. Ariz. 1969), *aff'd per curiam*, 396 U.S. 18 (1969). Svensson then filed an application with the Commission for temporary authority to continue interstate services in Arizona. On January 15, 1970, the Commission allowed Svensson to continue limited operations, and on February 15, 1970, Donald L. Washum was granted temporary permission to manage Los Angeles-Yuma Freight Lines. Svensson and Donald L. Washum then moved to have their temporary authority made permanent, and on Jan-

[2] Certificates of convenience and necessity, as opposed to ordinary certificates of registration, are limited grants authorizing Motor Carrier activities if the Commission finds (1) the applicant is "fit, willing, and able properly to perform the service proposed" and (2) that the service proposed "is or will be required by the present or future public convenience and necessity." 49 U.S.C. § 307.

[3] MC-C-5262.

[4] MC-96784, Sub. 2.

[5] MC-F-9618.

[6] 104 M.C.C. 838 (1968).

uary 19, 1971, a Commission administrative law judge granted both applications.[7] Those decisions were reversed on October 17, 1972, by a panel of commissioners voting two to one to deny the applications.[8] Motions for rehearing were denied by Commission order of May 8, 1974, and CIV 74-450 was filed here to reconsider the validity of the October 1972 decision.

II.

Civil case No. CIV 74-450 is a three-fold attack upon the 1972 Commission holding and this reviewing Court is bound by the standards of the Administrative Procedure Act:

> "The reviewing court shall—
>
> . . .
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> . . .
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence. . . ."

5 U.S.C. § 706(2).

Plaintiffs' first contention is basically a collateral attack upon the earlier 1968 Commission decision which was used in support of the 1972 Commission decision. However, in the earlier opinion of this Court, *Washum* v.

[7] On August 28, 1969, Svensson filed an action docketed in MC-96784, Sub. 5, seeking permanent authority to operate. On February 26, 1970, Donald L. Washum filed an action docketed in MC-F-10767 seeking permanent operational authority.

[8] 116 M.C.C. 158 (1972).

United States, supra, it was held "[b]ased upon our examination of the record before the Commission in light of the authorities cited by the parties, we are satisfied that the Commission followed the law and that its findings are supported by substantial evidence, including inferences reasonably drawn therefrom." 299 F.Supp. at 713. Therefore, under the doctrine of *res judicata*, this Court will not consider an attack upon a decision involving issues raised or which should have been raised in prior adjudications. *Partmar Corp.* v. *Paramount Theatres Corp.*, 347 U.S. 89 (1954); *Callahan Road Improvement Co.* v. *United States*, 345 U.S. 507 (1953); *Jackson* v. *Irving Trust Co.*, 311 U.S. 494 (1941).

Plaintiffs' second attack upon the 1972 Commission finding that Svensson was unfit to receive a permanent certificate must also fail. The Commission decision is supported by substantial evidence in light of: (1) the 1968 ruling that the plaintiffs were under common control; (2) the finding that Svensson had operated unlawfully between October 27, 1969, and January 15, 1970, and; (3) the plaintiffs' failure to rebutt alleged tariff violations.

While we are mindful that the plaintiffs have argued their own interpretation of this evidence,[9] we find under the narrow standard of review of the Administrative Procedure Act that there was a rational basis for the Commission's 1972 finding and that said finding was supported by substantial evidence. *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974); *Washum* v. *United States, supra.*

[9] For example, while the plaintiffs have presented several theories condoning their continued operations, we can find no justification for activities beyond December 28, 1969, when plaintiffs had been advised for thirty days that the stay pending appeal to the Supreme Court had been dissolved November 28, 1969.

Finally, this Court finds plaintiffs' third argument attacking the 1972 decision must fail. While the Administrative Procedure Act mandates findings on all material issues, 5 U.S.C. § 557(c), we are not persuaded that failure to mention plaintiffs' temporary operations was in error. It is questionable that the temporary operations were material at the time the 1972 decision was rendered, and when that decision was amended by Corrected Commission Order served May 8, 1974, the Commission stated at page 2 of that Order that the newly submitted traffic report did not alter the original 1972 holding.

III.

Turning to the companion case, CIV 75-110, the only real issue before the Court is whether an abuse of discretion occurred when the Commission on December 30, 1974, denied plaintiff's petition for rehearing. Plaintiffs argue that almost four and one-half years have passed since the Commission last considered evidence of the public need for plaintiffs' operations. However, in *Bowman*, *supra*, the Supreme Court found no abuse of discretion in the failure of the Commission to hear additional evidence after a lapse of five years:

> "We appreciate the difficulties that arise when the lapse between hearing and ultimate decision is so long. . . .
>
> Nevertheless, we have always been loathe to require that factfinding begin anew merely because of delay in proceedings of such magnitude and complexity." 419 U.S. at 294.

The same reviewing standards used in *Bowman* must apply here and we find that the Commission did not abuse its discretion in denying plaintiffs' petition for rehearing.

It is true that the Commission has not acted with desirable speed in resolving this matter which began nine years ago. The almost two hundred pages of letters from customers favoring plaintiffs' continued operation indicate the need for the Commission to promptly determine matters such as this. However, we reluctantly conclude that the law as passed by Congress and facts presented here mandate a determination against plaintiffs.

Accordingly, plaintiffs' claims for relief are denied in both CIV 74-450 and CIV 75-110. The restraining order previously issued in CIV 75-450 is vacated and

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that both actions are dismissed.

DATED this 17 day of June, 1975.

/s/ Ozell W. Trask
United States Circuit Judge

/s/ William G. East
United States District Judge

/s/ C. L. Muecke
United States District Judge

APPENDIX B

Report and Order of the Interstate Commerce Commission, Division 3, in Donald L. Washum—Control—Haywood Washum, No. MC-F-10767, No. MC-96784 (Sub-No. 5), decided October 17, 1972.

No. MC-F-10767 [1]

DONALD L. WASHUM—CONTROL—HAYWOOD WASHUM

Decided October 17, 1972

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1. In No. MC-F-10767, acquisition by Donald L. Washum of control of Haywood L. Washum, doing business as Los Angeles-Yuma Freight Lines through management, denied.
2. In No. MC-96784 (Sub-No. 5), issuance of a certificate of public convenience and necessity authorizing described operations as a common carrier by motor vehicle, denied.

Harold G. Hernly, Harold G. Hernly, Jr., and *John R. Sims, Jr.*, for applicants.

Donald E. Fernaays and *R. Y. Schureman* for protestants.

REPORT OF THE COMMISSION

DIVISION 3, COMMISSIONERS TUGGLE, BUSH, AND GRESHAM

GRESHAM, *Commissioner*:

Exceptions to the recommended report and order of the hearing examiner were filed by Thunderbird Freight Lines, Inc., and jointly by Consolidated Freightways Corporation of Delaware, Hopper Truck Line, Milne Truck Lines, Inc., Navajo Freight Lines, Inc., and Western

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[1] This proceeding also embraces No. MC-96784 (Sub-No. 5), Sevensson Freight Lines, Inc., Extension—Yuma, Arix.

Gillette, Inc., protestants, to which applicants replied. Our conclusions differ from those of the examiner.

In No. MC-F-10767, by application filed February 26, 1970, Donald L. Washum, an individual of Yuma, Ariz., seeks authority under section 5 of the Interstate Commerce Act to control through management Haywood L. Washum, doing business as Los Angeles-Yuma Freight Lines, a motor common carrier, authorized to transport general commodities, with exceptions, (1) between Los Angeles, Calif., and Yuma over U.S. Highway 99 and 80 serving all intermediate points and various off-route points including those in the Los Angeles Harbor commercial zones, and (2) between Yuma, on the one hand, and, on the other, points in Arizona within 30 miles of Yuma.

By a separate application in No. MC-96784 (Sub-No. 5), filed August 28, 1969, and as a matter directly related to the application in No. MC-F-10767, Svensson Freight Lines, Inc., of Yuma, Ariz., seeks a certificate of public convenience and necessity under section 207 of the act, authorizing operations in interstate or foreign commerce as a motor common carrier of general commodities, except those of unusual value, classes A and B explosives, household goods as defined by the Commission, commodities in bulk, and commodities which because of size or weight require the use of special equipment, between Yuma and Phoenix, Ariz., over U.S. Highway 80, serving all intermediate points, the off-route points of Roll and Hyder, Ariz., and points within a 30-mile radius of Yuma.

A hearing has been held at which the protestants appeared and presented evidence. Facts relating to applicants' and protestants' operations, the supporting shippers and the terms of the transaction, as set out in the examiner's report, are adopted as our own and will not

be restated herein except to the extent required for clarity.

Preliminary to our analysis of the substantive issues raised in these proceedings, a procedural question requires disposition. By petition filed March 29, 1971, applicants request that the embraced operating rights application proceeding, No. MC-96784 (Sub-No. 5), be reviewed by division 1 of this Commission rather than by division 3. In view of the fact that the two involved proceedings are interrelated; inasmuch as related section 5 and section 207 applications are customarily assigned to division 3 under the Commission's Organization Minutes; and because, in this particular instance, the section 5 application is in fact the "lead" application, with the section 207 application being merely an extension of the section 5 transaction, the operating rights case is properly before division 3, and applicants' petition will be denied.

Pursuant to authority granted under section 210a(a) on January 15, 1970, applicant, Svensson, holds temporary authority to perform the service sought by the instant application. By order of the Commission dated March 17, 1970, issued under section 210a(b), Donald L. Washum, applicant's president and sole stockholder, has been granted permission to control, through management, Haywood Washum (the father of Donald Washum), doing business as Los Angeles-Yuma Freight Lines, hereinafter referred to as LAY.

Svensson has performed operations under a certificate of registration issued June 10, 1964, in No. MC-96784 (Sub-No. 1). As a result of a complaint filed against the applicant in 1966, hearings were held, and by order of April 25, 1968, in No. MC-C-5262, division 3 found that applicant and LAY (Donald Washum and Haywood Washum) had exercised, since July 1957, continuous control and management in common interest in violation of

section 5(4) of the act, and the certificate of registration was, therefore, voided. After subsequent judicial review, our decision was affirmed by the Supreme Court by its issuance of a *per curiam* opinion on October 27, 1969. *Haywood Washum* v. *United States*, 396 U.S. 18.

The examiner recommended approval of the proposed acquisition by Donald Washum of control of Haywood Washum and the issuance of a certificate of public convenience and necessity conditioned upon the coincidental cancellation of that portion of the LAY certificate which authorizes irregular-route operations. The examiner's report and recommended order accepted the prior unlawful operations as evidence of a public need in support of the application under section 207.

Protestants seek reversal of the examiner's recommended approval of the applications in the light of the examiner's failure to find that the operations conducted by Svensson prior to January 15, 1970, were performed without color of right; that the operations conducted between October 27, 1969, and January 15, 1970, were in willful and flagrant violation of the Interstate Commerce Act and of the orders of the Commission and of the courts; that the non-assessment of charges for off-highway service by Svensson is demonstrative of its unfitness; that shipper support was predicated on preference rather than need; that protestants' services are meeting the reasonable transportation requirements of supporting shippers; and that public convenience and necessity does not require granting of the certificate application in view of the lack of any overwhelming evidence of public need for the proposed service and the willful and flagrant disrespect of the applicants herein for the Commission and the courts.

Applicants' reply to protestants' exceptions argues that the findings and recommendations of the examiner are correct in all material respects and should be affirmed.

Discussion and Conclusions

The main issue to which we must address ourselves is whether the pattern of conduct of applicant, Svensson, which has brought it into continuing and recurring violations of the act since 1957 gives rise to the conclusion that such applicant is unfit and, therefore, warrants the denial of the section 207 application now before us. Considering the following factors, and the insufficient public need shown for this service as discussed below, we are of the view that applicant is unfit and that the application should be denied: (1) in *Svensson Freight Lines—Purchase—Haywood Washum*, 104 M.C.C. 838 (1968), the *Washum* case, these applicants were found to have been in violation of section 5(4) of the act since 1957; (2) after affirmance of our report by the United States District Court for the District of Arizona in *Haywood Washum* v. *United States*, 299 F.Supp. 712 (1969), and by the Supreme Court *per curiam* at 396 U.S. 18 (October 27, 1969), applicant Svensson continued operations until January 15, 1970, without authority. Such operations were undertaken despite the advice of counsel to the contrary and in the face of the fact that the Supreme Court's decision required them to cease and desist from all interstate operations as of October 27, 1969. Applicant concedes on exceptions that such operations were unlawful, and we can only conclude that they were carried on in willful and flagrant violation of the orders of this Commission and the courts; and (3) applicants leave unrebutted the charge of protestants on exceptions that there were additional violations of the Commission's rules up until at least the date of hearing on these applications. These alleged violations involved the failure of applicants to comply with applicable tariffs by not assessing charges for the collection of freight advances and for off-route service. In fact, if these allegations are fully sustained, it may well

be the failure of Svensson to collect such charges that has made it so popular with off-route shippers and given it an unfair advantage over competing carriers.

In the *Washum* case we found that the prior certificate of registration was invalid from the date of issuance with the result that the applicant is to be considered a new carrier requesting permission to provide service in the field between Los Angeles and Phoenix by interline over the Yuma gateway. Under the provisions of section 207 of the act, an applicant for motor common carrier authority has the burden of establishing that the operation it proposes is or will be required by the present or future public convenience and necessity. In considering whether and to what extent this statutory requirement has been met, we must determine whether the new operation will serve a useful purpose responsive to a public demand or need; whether this purpose can or will be served as well by existing carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to public interest. *Pan-American Bus Lines Operation*, 1 M.C.C. 190, 203 (1936).

The burden of showing public convenience and necessity may be met in two ways. One, through evidence of past lawful operations conducted in interstate commerce under the certificate of registration, and the other, through evidence of need for the proposed transportation elicited from shipper witnesses. See *Worster—Control —McKay & MacLeod Corp.*, 85 M.C.C. 679, 686 (1960). In view of our finding regarding applicant Svensson's lack of fitness, we cannot condone its past unlawful operations by affording credibility to its evidence of those past operations to support the approval of its section 207 application. As evidence of a need for the proposed service, some 51 shippers testified in support of the

applicants' proposal, with approximately 40 of the 51 witnesses limiting their support to service originating at or destined to points in Yuma County, Ariz. However, the main purpose of the application before us is to provide Los Angeles-Phoenix through service as a result of the interlining between LAY and Svensson. With this framework in mind, it appears that the use of the testimony of the remaining shippers as evidence of the need of the proposed service is insufficient to support an unrestricted grant of authority providing for the transportation of general commodities between these large metropolitan areas.

Applicants cite the decision in *Armored Carrier Corporation* v. *United States*, 260 F. Supp. 612 (1966), affirmed *per curiam*, 386 U.S. 778 (1967), in support of their argument that willful misconduct should not be a per se bar to a grant, where a strong public need exists for the service, citing, in particular, the following language:

> Accordingly, we find that past willful misconduct is not, as a matter of law, sufficient to bar a grant of authority. *Rather, the I.C.C. is to consider such willful misconduct as an element in assessing the applicant's present and prospective fitness within the Act.* [Emphasis supplied.]

They also argue that the need presented herein for the proposed service is sufficient to overcome whatever law violations may have occurred, citing, among others, *Johnson Common Carrier Application*, 110 M.C.C. 507, to support their argument. Yet, analysis of that decision reflects that not only were willful violations not involved, but also there was clear and convincing evidence that the unauthorized activities had been discontinued.

It is our view that the court's conclusions in the *Armored Carrier* case in fact also support the approach

we are taking herein. We have considered applicant's past willful misconduct as an "element in assessing" their "present and prospective fitness." As discussed above, their past willful misconduct does not stand as an isolated incident but fits into a larger and continuing pattern of violations of regulatory requirements that have occurred over a number of years and in the face of court orders. There is nothing on this record to suggest that this flagrantly unlawful type of conduct will not occur, if not continue, in the future. Prior decisions of this Commission have also established that a carrier's explanation that its service was required by the public is no justification for past operations which have been conducted in willful violation of the act. See, for instance, *Antietam Transit Co., Inc., Common Carrier Application*, 84 M.C.C. 459 (1961); and *Haywood Trucking Co. Contract Carrier Application*, 81 M.C.C. 437 (1959). Under certain limited circumstances, we conceivably could grant an application, despite a record of willful misconduct, where an *overriding* public need has been demonstrated for a proposed service. This would involve a finding that our denial of an application would be tantamount to punishing the public by cutting off such a service. However, such a finding cannot be made in the case under review.

Applicants have not shown the service of the number of protesting carriers to inadequate. Also, a large portion of the shipper support can be characterized as being a preference, not a need, for this service, arising out of the "personalized," off-route service so strongly touted as being performed by applicants. In addition, as a result of our conclusions herein, Svensson will not be a certificated interstate carrier upon denial of the subject 207 application. We, therefore, note that Svensson would need no authority from this Commission to take control of LAY, as proposed herein.

One final matter requires our consideration. Section 102 of the National Environmental Policy Act of 1969 requires detailed statements as to the effect upon the environment of any major Federal action significantly affecting the quality of the human environment. No questions concerning the environment have been raised on the record in the proceeding presently before us, and our independent appraisal of the situation reveals that denial of the applications herein should have no appreciable environmental effect. Thus, we find that this is not a major Federal action which will significantly affect the quality of the human environment.

FINDINGS

We find that in No. MC-96784 (Sub-No. 5) applicant has failed to establish that the present or future public convenience and necessity require the proposed operations; and that the application should be denied.

We further find that in No. MC-F-10767 the acquisition by Donald L. Washum of control of Haywood L. Washum, doing business as Los Angeles-Yuma Freight Lines, through management, has not been shown to be consistent with the public interest and should also be denied.

We further find that this decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

COMMISSIONER BUSH, dissenting:

A fundamental right of any party to a proceeding is exhaustion of administrative and judicial remedies

which allegedly occurred on October 27, 1969. Operations conducted through this date were under a lawful color of right. From that date until January 15, 1970, when temporary authority was granted to perform the service sought by the instant application, I am of the view that the unauthorized operations were not shown to have been willful and flagrant and in constant disregard for regulation so as to bar approval of the applications. I would, therefore, approve and authorize control by Donald Washum of Haywood Washum, doing business as Los Angeles-Yuma Freight Lines through management and find that public convenience and necessity require operation by Svensson Freight Lines, Inc., as a common carrier by motor vehicles of general commodities, with the usual exceptions, in interstate or foreign commerce between the points set forth in its application.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, held at its office in Washington, D.C., on the 17th day of October 1972.

No. MC-F-10767

DONALD L. WASHUM—CONTROL—HAYWOOD WASHUM

No. MC-96784 (Sub-No. 5)

SVENSSON FREIGHT LINES, INC., EXTENSION—YUMA, ARIZ.

Investigation of the matters and things involved in these proceedings having been made, and the said division, on the date hereof, having made and filed a report containing its findings of fact and conclusions thereon, which report, together with the report of the examiner, is hereby made a part hereof:

It is ordered, That the petition of applicants, filed March 29, 1971, for designation of division 1 as the division to review the proceeding in No. MC-96784 (Sub-No. 5) be, and it is hereby, denied.

It is further ordered, That the applications be, and they are hereby, denied.

It is further ordered, That on the effective date of this order, Svensson Freight Lines, Inc., shall discontinue for the future all operations, in interstate or foreign commerce, and shall, within 10 days thereafter, report to this Commission that such discontinuance has been accomplished.

It is further ordered, That the authority granted under section 210a(b) of the act, by order of March

21, 1970, as extended by order of August 17, 1970, in No. MC-F-10767, for temporary control of Haywood Washum by Donald Washum shall be of no further force and effect on the effective date of this order.

And it is further ordered, That this order shall be effective 35 days from the date it is served.

By the Commission, division 3.

ROBERT L. OSWALD,
Secretary.

[SEAL]

APPENDIX C

Corrected Order of the Interstate Commerce Commission, Division 3, in Donald L. Washum—Control—Haywood Washum, No. MC-F-10767, No. MC-96784 (Sub. No. 5), decided April 30, 1974.

It appearing, That the petition of Robert E. Joyner for leave to intervene is responsive to issues raised by applicants in its petitions and bears directly on the proper weight to accord applicant motions;

It further appearing, That the issue of admissibility of polygraphic evidence need not be reached, since even were the proffered test evidence accepted as accurate and complete, it would not effect or decision in this proceeding;

It further appearing, That those portions of the verified statements of Verlan Lee and Lafayette Fletcher which seek to related the contents of the telephone conversation of Donald and Haywood Washum and Robert Joyner from Washington constitute heresay, and accordingly, should be stricken;

It further appearing, That those portions of protestants' replies referring to a possible future sale of Sevensson Freight Lines, Inc., and Los Angeles-Yuma Freight Lines to System 99 and to a financial involvement of counsel in applicant are unsubstantiated and should be stricken;

It further appearing, That applicants' petition for further oral argument, receipt of additional evidence, and/or hearing seeks, among other things, to offer into the record a traffic study proporting to show Sevensson Freight Lines, Inc. as a transporter of small shipments; that whereas receipt of such evidence into the record appears warranted receipt and consideration of such data does not warrant a conclusion contrary to that reached with report and order of October 1972;

It further appearing, That the findings and conclusions set forth in the said report and order of October 17, 1972, are supported by the evidence of record; that the petition for reconsideration presents no new substantive issues or argument not previously considered by the said

Division; and that there has been presented no error of fact or law warranting reconsideration:

It is ordered, That to the extent heretofore stated applicant's motion to strike the replies of protestants be, and it is hereby, granted.

It is further ordered, That the petition of Robert E. Joyner for leave to intervene, be, and it is hereby, granted.

It is further ordered, That to the extent heretofore stated the motion of certain protestants to strike applicant's reply to the petition for leave to intervene be, and it is hereby, granted.

It is further ordered, That the petition seeking further oral argument, receipt of additional evidence and/or hearing is granted for the limited purpose of accepting and admitting into the record the tendered traffic study; and that in all other respects the said petition be, and it is hereby, denied.

It is further ordered, That the petition of applicant, seeking reconsideration be, and it is hereby, denied.

It is further ordered, That the order of the Commission, Division 3, shall be effective twenty days from the date of service hereof.

By the Commission, Division 3, acting as an Appellate Division.

ROBERT L. OSWALD,
Secretary.

[SEAL]

NOTE: This decision is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

APPENDIX D

Opinion and Order of the U.S. District Court for the District of Arizona in Washum, *et al.* v. United States, *et al.*, Civil Action No. 6886, decided April 1, 1969, reported at 299 F. Supp. 712.

UNITED STATES DISTRICT COURT
D. ARIZONA

No. Civ. 6886

HAYWOOD WASHUM ET AL.,
Plaintiffs,
v.
UNITED STATES OF AMERICA,
Defendant.

April 1, 1969

Action to review order of Interstate Commerce Commission. A three-judge court held that where the Interstate Commerce Commission followed the law and its findings were supported by substantial evidence, including inferences reasonably drawn therefrom, the court would not be warranted in overturning the Commission's orders simply because there was also substantial evidence in record which would support findings favorable to the plaintiffs.

Complaint dismissed.

Richard A. Wilson, of Lutich, D'Angelo & Wilson, Phoenix, Ariz., for plaintiffs, Robert E. Joyner, of Wrape & Hernly, Memphis, Tenn., of counsel.

John N. Mitchell, U.S. Atty. Gen., Edwin M. Zimmerman, Asst. Atty. Gen., John H. D. Wigger, Atty., Washington, D.C., Richard C. Gormley, Asst. U.S. Atty., Phoenix, Ariz., for defendant.

Robert W. Ginnane, Gen. Counsel, Nathan Litt, Atty., Washington, D.C., for Intervenor I.C.C.

Russell & Schureman, Los Angeles, Cal., Twitty, Sievwright & Mills, Phoenix, Ariz., for intervenor Freight Lines.

Before JERTBERG and BROWNING, Circuit Judges, and CRAIG, District Judge.

ORDER

PER CURIAM.

[1, 2] Palintiffs' motion for leave to amend the complaint and to adduce additional evidence is denied. The issue which plaintiffs seek to present was not submitted to the Commission, and may not be raised for the first time in this court. United States v. L. A. Tucker Truck Lines, 344 U.S. 33, 36-37, 73 S.Ct. 67, 97 L.Ed. 54 (1952); United States v. Capital Transit Co., 338 U.S. 286, 291, 70 S.Ct. 115, 94 L.Ed. 93 (1949); United States v. Hancock Truck Lines, 324 U.S. 774, 778-780, 65 S.Ct. 1003, 89 L.Ed. 1357 (1945); Neisloss v. Bush, 110 U.S.App.D.C. 396, 293 F.2d 873, 880 (1961). Moreover, with exceptions not applicable here, our review of the Commission's order is limited to the record presented to the Commission. Interstate Investors, Inc. v. United States, 287 F.Supp. 374, 385-386 (S.D.N.Y. 1968), affirmed 393 U.S. 479, 89 S.Ct. 707, 21 L.Ed.2d 687 (1969).

[3] Based upon our examination of the record before the Commission in the light of the authorities cited by the parties, we are satisfied that the Commission followed the law and that its findings are supported by substantial evidence, including inferences reasonably drawn therefrom. We would not be warranted in overturning the Commission's orders simply because there is also substantial evidence in the record which would have supported findings favorable to the plaintiffs. Consolo v. Federal Maritime Comm., 383 U.S. 607, 619-621, 86 S.Ct. 1018, 16 L.Ed.2d 131 (1966); Illinois Central R.R. v. Norfolk & Western R.R., 385 U.S. 57, 66, 87 S.Ct. 255, 17 L.Ed.2d 162 (1966). Accordingly, the complaint is dismissed, and the temporary restraining order heretofore entered is vacated.

APPENDIX E

Decision and Order of the Interstate Commerce Commission, Division 3, in Svensson Freight Lines—Purchase—Haywood Washum, No. MC-F-9618, No. MC-C-5262, and No. MC-96784 (Sub No. 2), decided April 25, 1968, and reported at 104 M.C.C. 838.

No. MC-F-9618 [1]

SVENSSON FREIGHT LINES—PURCHASE—HAYWOOD WASHUM

1. In No. MC-F-9618, application of Svensson Freight Lines for authority to purchase operating rights and certain property of Haywood Washum denied.

2. In No. MC-C-5262, defendants Haywood Washum and Don Washum, and each of them, found to be exercising control and management in a common interest of the operations of Haywood Washum, doing business as Los Angeles-Yuma Freight Lines, with the operations of defendant Svensson Freight Lines. Certificate of registration canceled. Defendant Svensson Freight Lines ordered to cease and desist operations in interstate commerce.

3. In No. MC-96784 (Sub-No. 2), public convenience and necessity found not shown to require operation by applicant as a common carrier by motor vehicle of specified commodities over regular routes between described points in Arizona. Application denied.

Pete H. Dawson for applicant in Nos. MC-F-9618 and MC-96784 (Sub-No. 2) and defendant in No. MC-C-5262.

R. Y. Schureman for protestants in Nos. MC-F-9618 and MC-96784 (Sub-No. 2) and for complainants in No. MC-C-5262.

Peter C. Byrne for defendants in No. MC-C-5262.

---

[1] This report also embraces No. MC-C-5262, *Consolidated Copperstate Lines, et al.*, v. *Haywood Washum*, an individual d.b.a. *Los Angeles-Yuma Freight Lines, et al.*, and No. MC-96784 (Sub-No. 2), *Svensson Freight Lines Conversion Application—Arizona.*

DECISION AND ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 3, Commissioners *Tuggle*, *Bush*, and *Stafford* (Commissioner *Stafford* dissents), held at its office in Washington, D.C., on the 25th day of April 1968.

Upon consideration of the applications, the complaint, and the record in the above-entitled and embraced proceedings, including the report and recommended orders of Joint Board No. 47 (board) and of the hearing examiner, each served October 20, 1967,[2] the exceptions filed thereto by applicants—defendants, and the replies thereto by complainants—protestants.[3]

It appearing, That the respective findings and conclusions of the hearing examiner in No. MC-F-9618, and of the board in No. MC-C-5262, and No. MC-96784 (Sub-No. 2) are proper and correct in all material respects; that the exceptions and replies otherwise raise no new or material matters of fact or law not adequately considered and properly disposed of by the hearing examiner and the board in their respective reports; and that said exceptions and replies, otherwise, are not of

[2] These three related matters were heard on a consolidated record before a hearing examiner and Joint Board No. 47. Separate recommended orders were served. By order dated February 19, 1968, No. MC-C-5262, was assigned to division 3 for concurrent handling and disposition with this proceeding and No. MC-96784 (Sub-No. 2).

[3] Complainants in No. MC-C-5262 are Consolidated Copperstate Lines, Consolidated Freightways Corporation of Delaware, Hopper Truck Lines, Lee Way Motor Freight, Inc., Milne Truck Lines, Inc., Navajo Freight Lines, Inc., Pacific Motor Trucking Company, T.I.M.E. Freight, Inc., Thunderbird Freight Lines, Inc., and Western Gillette, Inc. Each, except Consolidated Freightways of Delaware, oppose the application in No. MC-96784 (Sub-No. 2), and each, except Consolidated Freightways and Lee Way Motor Freight, oppose the application in No. MC-F-9618. Applicants-defendants, and complainants-protestants, shall hereinafter be referred to as applicants and protestants, respectively.

such a nature as to require the issuance by division 3 of a report discussing the evidence in the light of such pleadings;

Wherefore, and good cause appearing therefor:

We find, That the evidence considered in the light of the exceptions and the replies does not warrant a different result from that reached by the hearing examiner and the board in their respective reports, that the statement of facts, the conclusions and the findings of the hearing examiner and the board being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own.

It is ordered, That, in No. MC-F-9618, the order of the hearing examiner, which would deny the application, be, and is hereby, adopted as the order of the Commission, division 3, effective 20 days after the date of service hereof;

It is further ordered, That, in No. MC-C-5262, the order of the Joint Board No. 47, which finds the applicants in violation of section 5(4) of the Interstate Commerce Act, which orders applicants to cease and desist such violation, and which finds that a certificate of registration was improvidently issued to Svensson Freight Lines, in No. MC-96784 (Sub-No. 1) on June 5, 1963, and has been invalid since that date, be, and is hereby, adopted as the order of the Commission, division 3, effective 20 days after the date of service hereof; and

It is further ordered, That, in No. MC-96784 (Sub-No. 2) the order of Joint Board No. 47, which would deny the application, be, and it is hereby, adopted as the order of the Commission, division 3, effective 20 days after the date of service hereof.

APPENDIX F

Statutes Involved

5 U.S.C. § 557(c)

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

49 U.S.C. § 306(a)(7)(A)

(7)(A) In the case of any person who or which on October 15, 1962, was in operation solely within a single State as a common carrier by motor vehicle in intrastate commerce (excluding persons controlled by, controlling, or under a common control with, a carrier engaged in operations outside such State), and who or which was also lawfully engaged in such operations in interstate or foreign commerce under the certificate exemption provisions of the second proviso of paragraph (1) of this subsection, as in effect immediately before October 15, 1962,

or who or which would have been so lawfully engaged in such operations but for the pendency of litigation to determine the validity of such person's intrastate operations to the extent such litigation is resolved in favor of such person, and has continued to so operate since October 15, 1962 (or if engaged in furnishing seasonal service only, was lawfully engaged in such operations in the year 1961 during the season ordinarily covered by its operations, and such operations have not been discontinued), except in either instance as to interruptions of service over which such person had no control, the Commission shall issue to such person a certificate of registration authorizing the continuance of such transportation in interstate and foreign commerce if application and proof of operations are submitted as provided in this subsection. Such certificate of registration shall not exceed in scope the services authorized by the State certificate to be conducted in intrastate commerce, and shall be subject to the same terms, conditions, and limitations as are contained in or attached to the State certificate except to the extent that such terms, conditions, or limitations are inconsistent with the requirements established by or under this Act. If the effectiveness of the State certificate is limited to a specified period of time, the certificate of registration issued under this paragraph (7) shall be similarly limited. Operations in interstate and foreign commerce under such certificates of registration shall be subject to all other applicable requirements of this Act and the regulations prescribed hereunder. Certificates of registration shall be valid only so long as the holder is a carrier engaged in operation solely within a single State, not controlled by, controlling, or under a common control with a carrier engaged in operation outside such State, and except as provided in section 5 of this title and in the conditions and limitations stated herein, may be transferred pursuant to such rules and regulations as may be prescribed by the Com-

mission, but may not be transferred apart from the transfer of the corresponding intrastate certificate, and the transfer of the intrastate certificate without the interstate or foreign rights shall terminate the right to engage in interstate or foreign commerce. The termination, restriction in scope, or suspension of the intrastate certificate shall on the 180th day thereafter terminate or similarly restrict the right to engage in interstate or foreign commerce unless the intrastate certificate shall have been renewed, reissued, or reinstated or the restrictions removed within said one hundred and eighty-day period. Such certificates of registration shall be subject to suspension or termination by the Commission in accordance with the provisions of this Act governing the suspension and termination of certificates of public convenience and necessity issued by the Commission.

49 U.S.C. § 310a(a)

(a) To enable the provision of service for which there is an immediate and urgent need to a point or points or within a territory having no carrier service capable of meeting such need, the Commission may, in its discretion and without hearings or other proceedings, grant temporary authority for such service by a common carrier or a contract carrier by motor vehicle, as the case may be. Such temporary authority, unless suspended or revoked for good cause, shall be valid for such time as the Commission shall specify but for not more than an aggregate of one hundred and eighty days, and shall create no presumption that corresponding permanent authority will be granted thereafter.

49 U.S.C. § 312(a)

(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall remain in effect until suspended or terminated as herein provided.

Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however*, That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 304(c) of this title, commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further*, That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of sections 306, 309, or 311 of this title, or by virtue of the second proviso of section 306(a) of this title or temporary authority under section 310a of this title, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of sections 311 (c), 317(a), or 318(a) of this title or with any lawful order, rule or regulation of the Commission promulgated thereunder.

Service of the within and receipt of a copy thereof is hereby admitted this ..... day of September, A.D. 1975.

Supreme Court, U. S.
FILED
SEP 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1975
No. 75-280

DONALD L. WASHUM, an Individual, HAYWOOD L. WASHUM, d/b/a LOS ANGELES-YUMA FREIGHT LINES, INC., SVENSSON FREIGHT LINES, INC.,
Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MILNE TRUCK LINES, INC., NAVAJO FREIGHT LINES, INC., O-N-C FREIGHT SYSTEM, THUNDERBIRD FREIGHT LINES, and WESTERN GILLETTE, INC.,
Appellees.

On Appeal From the United States District Court for the District of Arizona.

MOTION TO AFFIRM.

R. Y. SCHUREMAN,
1545 Wilshire Boulevard,
Los Angeles, Calif. 90017,
Attorneys for Appellees, Milne Truck Lines, Inc., Navajo Freight Lines, Inc., O-N-C Freight System, Thunderbird Freight Lines and Western Gillette, Inc.

Of Counsel:
RUSSELL & SCHUREMAN,
1545 Wilshire Boulevard,
Los Angeles, Calif. 90017.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

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IN THE

Supreme Court of the United States

October Term, 1975
No. 75-280

DONALD L. WASHUM, an Individual, HAYWOOD L. WASHUM, d/b/a LOS ANGELES-YUMA FREIGHT LINES, INC., SVENSSON FREIGHT LINES, INC.,

Appellants,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MILNE TRUCK LINES, INC., NAVAJO FREIGHT LINES, INC., O-N-C FREIGHT SYSTEM, THUNDERBIRD FREIGHT LINES, and WESTERN GILLETTE, INC.,

Appellees.

On Appeal From the United States District Court for the District of Arizona.

MOTION TO AFFIRM.

1. Motion.

Appellees Milne Truck Lines, Inc., Navajo Freight Lines, Inc., O-N-C Freight System, Thunderbird Freight Lines and Western Gillette, Inc. hereby move that the judgment of the District Court be affirmed.

2. Ground for Motion.

This motion to affirm is made pursuant to the provisions of Rule 16.1 (c) of the Revised Rules of the Supreme Court of the United States (1970), as amended, and is made on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

3. Statement.

This matter involves a direct appeal from a 3-judge District Court, pursuant to 28 U.S.C. §§1253 and 2101(b). The District Court's opinion is reproduced as Appendix A to the Jurisdictional Statement [J.S.].[1]

The proceedings below involved two consolidated cases. The first, No. Civ 74-450, was commenced by appellants against appellees United States of America and Interstate Commerce Commission [Commission] to enjoin, annul and set aside certain orders of the Commission which are reproduced as J.S., Appendices B and C. The second action, No. Civ 75-110 was commenced by appellants against the United States of America and the Commission to enjoin, annul and set aside a subsequent order of the Commission in the same proceedings denying a petition for rehearing, which petition had been filed by appellants after the commencement of action No. Civ 74-450. These appellees intervened as defendants in both actions. Although appellants' claims for relief were denied in both cases, their appeal is directed to the District Court's opinion only insofar as it pertains to Action No. Civ 74-450.

[1]Terms in brackets indicate abbreviations used herein.

The historical background of the case is adequately summarized by the District Court (J.S., App. A, pp. 2a-4a) and by the Commission (J.S., App. B, pp. 1b-4b) and will be alluded to here only briefly in order to avoid prolixity.

The proceedings before the Commission involved two applications, one pursuant to Section 5 of the Interstate Commerce Act [Act] (49 U.S.C. §5) for the acquisition by Donald L. Washum, president and sole shareholder of Svensson Freight Lines [Svensson] of control of Haywood L. Washum, doing business as Los Angeles-Yuma Freight Lines [Section 5 application], and the other pursuant to Section 207[2] (49 U.S.C. §307) by Svensson for a certificate of public convenience and necessity authorizing transportation of property in interstate and foreign commerce by motor vehicle between Yuma and Phoenix, Arizona over U.S. Highway 80 serving all intermediate and certain off-route points [Section 207 application]. Los Angeles-Yuma Freight Lines [LAY], as the name suggests, holds a certificate of public convenience and necessity issued by the Commission authorizing transportation of property by motor vehicle in interstate and foreign commerce between Los Angeles, California and Yuma, Arizona. A grant of the applications, therefore, would have permitted the appellants to provide a through service between Los Angeles, California and Phoenix, Arizona in direct competition with the services offered by these appellees. By its report and order of October 17, 1972, *Donald L. Washum—Control—Haywood Washum*, 116 M.C.C. 158 (J.S., App. B) the Commission

[2]Unless otherwise indicated, all references are to the Interstate Commerce Act.

denied the Section 207 application on the basis of (a) a lack of fitness on the part of appellant Svensson and (b) failure of appellants to establish that the public convenience and necessity required a grant of the application.[3]

The Commission also denied the Section 5 application on the basis that denial of the Section 207 application would result in Svensson's not being a certificated interstate carrier, so that no authority from the Commission for control of LAY would be required.

Appellants filed with the Commission petitions seeking reconsideration of its said order and for further oral argument, receipt of additional evidence and/or hearing. The additional evidence consisted of a traffic study of operations conducted by Svensson purportedly pursuant to temporary operating authority granted by the Commission under Section 210a (a) (49 U.S.C. §310a (a)) (J.S., App. F, p. 3f). The Commission, by its Corrected Order dated April 30, 1974 (J.S., App. C) granted the petition for the limited purpose of accepting and admitting into the record the tendered traffic study but otherwise denied the petition and further denied the petition seeking reconsideration.

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[3]Section 207 provides in pertinent part as follows:

> "Subject to Section 210 [49 U.S.C. §310], a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part [Title 49 U.S.C., Chapter 8] and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. . . ."

Both elements ((a) fitness and (b) public convenience and necessity) must be established by an applicant in order to qualify for a certificate. *Zuzich Truck Line, Inc. v. United States,* 224 F. Supp. 457 (D. Kan. 1963).

In a prior proceeding in 1968, *Svensson Freight Lines —Purchase—Haywood Washum,* 104 M.C.C. 838. The Commission found, among other things, that a certificate of registration issued to Svensson on June 10, 1964 under Section 206(a) (7) (A) (49 U.S.C. §306(a) (7)(A)) had been improvidently issued and invalid since that date (J.S., App. E, p. 3e). Appellants thereafter brought an action in the United States District Court for the District of Arizona to enjoin, annul and set aside the commission's order. the 3-judge court in that matter dismissed the complaint, *Washum v. United States,* 299 F. Supp. 712 (D. Ariz. 1969) (J.S., App. D), and this Court affirmed the judgment *per curiam,* 396 U.S. 18 (1969). Among other matters considered by the Commission in its 1972 decision in determining lack of fitness on the part of appellant Svensson was the fact that, following affirmance by this court on October 27, 1969 of the District Court's 1969 judgment, Svensson continued to conduct operations until January 15, 1970[4] without authority from the Commission (its certificate of registration being invalid) and despite the advice of counsel to the contrary (J.S., App. B, p. 5b).

As one of their three grounds for seeking reversal of the District Court's judgment, appellants contend that the Commission was without power to declare Svensson's certificate of registration void without having followed the procedures established by Section 212 (a) (49 U.S.C. §312 (a)) (J.S., App. F, pp. 3f-4f), and that therefore the Commission's finding in its 1972 decision of Svensson's unfitness, to the extent it was based upon unauthorized operations conducted by Svensson following this Court's *per curiam* decision of Octo-

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[4]On that date the Commission granted Svensson temporary authority under Section 210a(a).

ber 27, 1969, was improper. That is, appellants are here undertaking to collaterally attack the Commission's 1968 decision which was affirmed by both the District Court and this Court.

Appellants also contend that the District Court improperly applied the doctrines of *res judicata* and collateral estoppel and that there is a conflict between the District Court's decision and a decision of a District Court in Minnesota.

None of the three contentions raised by appellants presents a substantial question which justifies further argument before this court.

4. Argument.

4.1. The Commission's Action in Its 1968 Decision, as Affirmed by the District Court and This Court, Finding That Svensson's Certificate of Registration Was Improvidently Issued and Thereby Invalid, Was Well Within the Jurisdiction and Power of the Commission.

Section 206(a)(7)(A) (49 U.S.C. §306(a)(7)(A)) (J.S., App. F., p. 1f) provides that the Commission shall issue a certificate of registration to any person who on October 15, 1962 was in operation solely within a single state as a common carrier by motor vehicle in intrastate commerce, excluding persons controlled by, controlling, or under common control with, a carrier engaged in operations outside such state, and who or which was also lawfully engaged in such operations in interstate or foreign commerce under the certificate exemption provision of the former second proviso of paragraph (1) of said subsection (a)

as in effect immediately before October 15, 1962,[5] authorizing the continuance of such transportation in interstate and foreign commerce upon application for and proof of such operations. Thus, the existence of the proscribed common-control relationship on October 15, 1962, or the absence of lawful operations under the former second proviso because of such common control relationship, renders a single-state carrier ineligible to receive a certificate of registration. *Homer White, Inc. v. United States,* 281 F. Supp. 436 (D.N.Y. 1968).

The Commission found in 1968 that as of October 15, 1962, Svensson was under common control with LAY, that prior to October 15, 1962 Svensson had not been operating lawfully under the former second proviso because of its common control relationship with LAY and that, therefore, the certificate of registration issued to Svensson on June 10, 1964 had been issued improvidently and was void *ab initio.*

As recognized by appellants (J.S., p. 8) the Commission has the power and the duty to declare invalid certificates which are issued as a result of ministerial error, fraud, misrepresentation, mistake, or inadvertence, that is, to take corrective action where there has been an obvious injustice. Section 17(3) (49 U.S.C. §17(3)); *American Trucking Associations v.*

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[5]The former second proviso read as follows:

"And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificate and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part."

Frisco Transp. Co., 358 U.S. 133, 145-146, 3 L. Ed. 2d 172, 79 S. Ct. 170 (1958); *Carl Subler Trucking v. United States,* 313 F. Supp. 971, 976 (S.D. Ohio 1970); *Smith Bros. Revocation of Certificate,* 33 M.C.C. 465 (1942), 42 M.C.C. 211 (1943).

In an apparent effort to dispel the notion that the Svensson certificate of registration was not issued as the result of any of the listed causes, appellants urge (J.S., pp. 4, 9) that the Commission and the District Court overlooked the fact that Svensson's application for the certificate or registration revealed that Svensson and LAY shared a terminal and equipment. Of course, the record of the Commission proceedings which resulted in its 1968 decision was not before the Court in the action which is the subject of the instant appeal. However, subsequent to oral argument in the court below, counsel for appellants submitted to the District Court a certified copy of Svensson's application for a certificate of registration which was filed with the Commission in February 1963, which was signed and verified by appellant Donald L. Washum. Paragraph V(b) of the application form inquires whether the applicant has any contract, lease, or arrangement for the joint use of offices, garages, motor vehicles or other facilities, or any other arrangement with any other transportation company or any person connected with such company and, if answered affirmatively, requires a full explanation on a separate sheet attached as Appendix "E" to the application. On Svensson's application the question was answered "yes", and Appendix "E" thereto stated in its entirety is as follows:

"Appendix 'E'

"1. Lease office space and dock facility in conjunction with L A Yuma Freight Lines in Yuma, Arizona. Leased on monthly basis.

"2. Occasional used (sic) of power equipment & trailers. Leased on mileage basis."

What appellants themselves overlook is the fact that Paragraph V(a) of the application, which reads "State whether the applicant, or any of applicant's stockholders, or any person named in Appendix 'A' is directly or indirectly affiliated with, in control of or under common control with any other carrier or carriers subject to the Interstate Commerce Act. (yes or no)," is answered "No." Appellants also overlook the facts upon which the Commission in 1968 based its finding and conclusion of the existence of common control, as set forth at 104 M.C.C. 848-851, reproduced as the Appendix hereto.

In *Reliance Truck Co.—Control and Merger,* 109 M.C.C. 495 (1970) the Commission made the following observation:

> "As distinguished from the situation here to be considered, the circumstances in the *Washum* case [104 M.C.C. 838] fully established that the carriers therein had been in violation of Section 5 (4), and had been unlawfully under common control continuously since July 1957. It was further established in the *Washum* case that when, in 1963, issuance of a certificate of registration to Svensson Freight Lines was sought, and prior thereto, on or about September 17, 1962, when the Washums were involved in a transfer proceeding, their common control, interests and affiliations had been deliberately concealed." (109 M.C.C. at 500.)

Manifestly, under these circumstances the Commission validly exercised its power to declare the Svensson certificate of registration void *ab initio*.

The cases cited and relied upon by appellants for the proposition that the Commission exceeded its power in so doing are clearly distinguishable. In *Castle v. Hughes,* 348 U.S. 61, 99 L. Ed. 68, 75 S. Ct. 191 (1954) the State of Illinois sought to enforce a statute suspending a carrier from use of the state highways because of repeated overweight violations. The Illinois Supreme Court held that the statute could not be enforced with respect to interstate traffic. This Court affirmed, holding that only the Commission has the power to suspend interstate operations of a carrier.

In *Civil Aeronautics Board v. Delta Airlines,* 367 U.S. 316, 6 L. Ed. 2d 869, 81 S. Ct. 1611 (1961) the Board issued a certificate, which became effective. Thereafter, on reconsideration, the Board attempted to insert restrictions without further hearings, which this Court held to be improper. There was no issue as to the validity of the certificate in the first instance.

United States v. Seatrain Lines, 329 U.S. 424, 91 L. Ed. 396, 67 S. Ct. 435 (1947) involved an attempt by the Commission to modify a certificate as a result of a change in the Commission's policy. The Court did not get to the question of the power of the Commission to correct mistakes in certificates of public convenience and necessity, because all the requisite information had been disclosed in the "grandfather" application involved, and there could have been no inadvertence on the part of the Commission in issuing the certificate.

Watson Bros. Transportation Company v. United States, 132 F. Supp. 905 (D. Neb. 1955), Aff'd. 350 U.S. 927 (1956), was decided prior to and, it is submitted, conflicts with the holding of this Court in *American Trucking Associations v. Frisco Transp. Co., supra,* 358 U.S. 133 (1958) with respect to the Commission's power to invalidate inadvertently issued certificates. As the dissent in the *Watson Bros.* case correctly points out, Section 212 (a) logically can have application only to lawfully issued certificates.

Perhaps the key to distinguishing between circumstances where the procedures established under Section 212 (a) are applicable and when they are not is best stated by the Commission in another case cited by appellants, *All American Transport, Inc.—Control and Merger,* 109 M.C.C. 243 (1969), namely, that "the registration holder should be given the opportunity to demonstrate or achieve compliance prior to such termination or revocation." (109 M.C.C. at 249).

Patently, where a certificate of registration has been validly issued to a single-state carrier under Section 206(a)(7)(A), and thereafter that carrier enters into a common control relationship with a carrier engaged in operation outside such state, the procedures established under Section 212 (a) would give the single-state carrier an opportunity to divest itself of the unlawful common control relationship. However, where, as here, the common control relationship (concealed from the Commission) existed on the critical date, October 15, 1962, and Svensson was not operating lawfully under the former second proviso of Section 206 (a)(1) immediately prior to that date, the requisites for the issuance of a certificate of registration to Svensson were absent and it would be impossible for Svensson to achieve

compliance. (*Homer White, Inc. v. United States,* 281 F. Supp. 436 (D.N.Y. 1968).

The power of the Commission to invalidate certificates issued as a result of fraud, misrepresentation, mistake or inadvertence or, as here, improvidently issued because of deliberate concealment of the unlawful common control relationship, is well established, and no further argument on the question is required.

But even if the Commission had acted in excess of its jurisdiction in 1968 in declaring the Svensson certificate of registration invalid, that circumstance would not be material insofar as the Commission's determination in its 1972 decision that Svensson lacked fitness is concerned. As earlier noted, Svensson continued to conduct operations in interstate commerce after the issuance of this Court's *per curiam* order on October 27, 1969, 396 U.S. 18, affirming the District Court's Judgment of April 1, 1969, 299 F. Supp. 712 (J.S. App. D), until January 15, 1970 (when Svensson received temporary operating authority from the Commission) despite the advice of counsel to the contrary (J.S., App. B, p. 5b). Section 207 provides that before an applicant can be issued a certificate of public convenience and necessity he must show, *inter alia,* that he is fit, willing and able to conform to the applicable provisions of the Act and the requirements, rules and regulations of the Commission thereunder. An order issued by a tribunal having jurisdiction over the subject matter and person must be obeyed by the parties until it is reversed by orderly and proper proceedings. *United States v. United Mine Workers of America,* 330 U.S. 258, 293, 91 L. Ed. 884, 67 S. Ct. 677 (1947). The Commission had subject-matter and *in personam* juris-

diction in the proceedings which led to its 1968 decision. Svensson's callous disregard of the Commission's determination, whether right or wrong, that the certificate of registration was void, particularly after having been affirmed by the District Court and this court, clearly reflects an unwillingness on the part of Svensson to conform to the Act and the requirements, rules and regulations of the Commission thereunder. Therefore, the Commission made no error in its 1972 decision in basing its finding of Svensson's unfitness in part upon its earlier determination that Svensson's certificate of registration was void.

4.2. The District Court Correctly Applied the Doctrine of Res Judicata.

In its 1968 decision affirming the order of the Commission which held the Svensson certificate of registration invalid, the Arizona District Court stated as follows:

> "Based upon our examination of the record before the Commission in the light of the authorities cited by the parties, we are satisfied that the Commission followed the law and that its findings are supported by substantial evidence, including inferences reasonably drawn therefrom." (J.S., App. D., p. 2d).

Accordingly, the court below correctly applied the doctrine of *res judicata* when it held that it would not consider an at ack upon a decision involving issues raised or which should have been raised in prior adjudications (J.S., App. A, p. 5a).

Of course, the purpose of the doctrine of *res judicata* is to prevent reopening of matters involving the same

parties which have been finally determined, whether or not all possible or available matters were actually litigated before the tribunal making the determination. *Grubb v. Public Utilities Commission,* 281 U.S. 470, 478-479, 74 L. Ed. 972, 50 S. Ct. 374 (1930). The doctrine is applied not only to effect a saving of the court's time but the time and money of the parties—both plaintiff and defendant—as well. *Blonder-Tongue Labs. v. University Foundation,* 402 U.S. 313, 324, 329, 28 L. Ed. 2d 788, 91 S. Ct. 1434 (1971).

Despite procedural irregularities in a proceeding before an administrative agency, not objected to in that proceeding or in a direct attack thereon, the agency's determination is not thereby void or subject to collateral attack, even though the result might have been different had a timely objection been raised. *Calahan Road Improvement Co. v. United States,* 345 U.S. 507, 512, 97 L. Ed. 1206, 73 S. Ct. 803 (1953); *United States v. L. A. Tucker Truck Lines,* 344 U.S. 33, 38, 97 L. Ed. 54, 73 S. Ct. 67 (1952); *Title v. Immigration and Naturalization Service,* 322 F. 2d 21, 22 (C.A. 9-1963).

The fact that a particular issue was not actually litigated in a prior proceeding is immaterial so long as there was full opportunity to litigate it and it was adjudicated by the decree. *Jackson v. Irving Trust Co.,* 311 U.S. 494, 503, 85 L. Ed. 297, 61 S. Ct. 326 (1941); See also: *Chicot Co. Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 375, 84 L. Ed. 329, 60 S. Ct. 317 (1940).

Appellants do not assert, nor could they properly do so, that they were denied a fair hearing in the proceeding before the Commission which led to the 1968 order

or that they were there prevented from raising their contentions with respect to the applicability of Section 212(a). The fact that they neglected to present that argument is clearly no basis upon which to permit a collateral attack upon the Commission's determination as affirmed by the District Court and this Court.

The thrust of appellants' primary argument here (J.S., pp. 10-13) is: that a judgment or an order of a tribunal which acts in the absence of jurisdiction, in the sense of not having the power to so act, is void and may be collaterally attacked; that the action of the Commission in its 1968 decision, declaring the Svensson certificate of registration invalid, was in excess of the Commission's jurisdiction; and that, therefore, the Court below erred in holding that the Commission's 1968 determination was not subject to collateral attack.

These appellees do not dispute that the cases cited by appellants support their major premise. However, as noted in the first portion of the argument, the Commission clearly had jurisdiction to declare the subject certificate invalid, so that the minor premise of appellants' syllogism thereby falls, and with it the conclusion.

Appellants also assert that the present proceeding involves a new cause of action. Such is not the case. Rather, appellants have only raised a new contention which they failed to raise in the prior proceeding. The "thing adjudged" by the Commission in its 1968 decision was that the Svensson certificate of registration was improvidently issued and void *ab initio.* This, in turn, was based upon the Commission's finding that the express conditions precedent to the issuance of a certificate of registration as set forth in Section 206(a)(7)(A) were absent because of the existence of the unlaw-

ful common control relationship as of October 15, 1962 and immediately prior thereto. Furthermore, as earlier noted, those facts could not have been eradicated by following the procedures set forth in Section 212 (a). Applying appellants' logic to this situation it could just as well be said that the Commission was without jurisdiction to issue the certificate of registration in the first instance, and that *that* action on the part of the Commission was thereby void.

Appellants also suggest, citing *Grose v. Cohen,* 406 F. 2d 823 (C.A. 4-1969) that it would be unjust to bar them from collaterally attacking the Commission's 1968 decision. But where is the injustice? Unlike the circumstances in the *Grose* case, the Commission's 1968 determination was appealed all the way to this Court and appellants were represented throughout the proceedings by competent counsel experienced in regulatory matters.

One further point: this is not, as appellants suggest (J.S., 14), a matter of applying *res judicata* "in the administrative law context" only; it also involves the application of *res judicata* to a prior judgment of the District Court, affirmed by this Court.

Manifestly, the Court below correctly applied the doctrine of *res judicata* and no substantial question on the issue justifying further argument before this Court has been presented.

4.3. There Is No Conflict Between Districts.

In one of the earliest cases decided by the Commission after passage of Part II of the Interstate Commerce Act, *Pan-American Bus Lines Operation,* 1 M.C.C. 190 (1936), quoted in *Barrett Mobile Home*

Transport, Inc. v. United States, 381 F. Supp. 1317 (D. Minn. 1973), the Commission set forth the criteria for determining whether the public convenience and necessity require a proposed operation as follows:

> "[W]hether the new operation or service will serve a useful public purpose, responsive to a public demand or need; whether this purpose can and will be served by existing lines or carriers; and whether it can be served by applicant with the new operation or service proposed without endangering or impairing the operations of existing carriers contrary to the public interest." (1 M.C.C. at 203).

In the *Barrett* case, it was clear from the Commission's report that evidence of the applicant's temporary authority operations was considered by the Commission solely as to the third criterion, namely, competitive effect on the operations of existing carriers, to the exclusion of the remaining criteria, and the Minnesota District Court quite properly remanded the matter to the Commission for further consideration. Because there is no indication here that the Commission considered Svensson's operations under temporary authority *solely* as to their competitive effect on the operations of these appellees and other existing carriers, there simply is no conflict between the *Barrett* decision and that of the Court below.

Moreover, unlike the circumstances in the *Barrett* case, the computer study of Svensson's operations referred to in J.S., p. 17, footnote 2, was tendered to the Commission *after* the issuance of its decision of October 17, 1972 (J.S., App. B) when appellants filed with the Commission on Jaunary 22, 1973 their peti-

tion seeking further oral argument, receipt of additional evidence and/or hearing, which petition, among others, was considered by the Commission in its Corrected Order of April 30, 1974 (J.S., App. C). In the latter order, as noted by the court below, the Commission found that, whereas receipt of such evidence into the record appeared warranted, receipt *and consideration* of such data did not warrant a conclusion contrary to that reached in its report and order of October 1972.

As this Court has repeatedly held, action by the Commission in connection with a petition for further hearing and receipt of additional evidence is a matter of discretion (the discretion of the Commission and not of the reviewing court) and will not be disturbed except on a showing of the clearest abuse of that discretion. *United States v. Pierce Auto Freight Lines,* 327 U.S. 515, 535, 90 L. Ed. 821, 66 S. Ct. 687 (1946); *Interstate Commerce Commission v. Jersey City,* 322 U.S. 503, 88 L. Ed. 1420, 64 S. Ct. 1129 (1944); *United States v. Interstate Commerce Commission,* 396 U.S. 491, 24 L. Ed. 2d 700, 90 S. Ct. 708 (1970); *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 42 L. Ed. 2d 447, 95 S. Ct. 438 (1974). No such abuse of discretion has been shown here.

5. Conclusion.

As the Court below correctly determined, the findings and conclusions set forth in the Commission's report and order of October 1972 have a rational basis and are supported by substantial evidence of record. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc., supra,* 419 U.S. 281 (1974). Further,

the Commission's action on the subsequently filed petition in making its Corrected Order of April 1974 was a proper exercise of its discretion. It is manifest that appellants have not presented any substantial question which justifies further argument before this Court, and the judgment of the District Court should be affirmed.

Respectfully submitted,

R. Y. SCHUREMAN,
Attorneys for Appellees, Milne Truck Lines, Inc., Navajo Freight Lines, Inc., O-N-C Freight System, Thunderbird Freight Lines and Western Gillette, Inc.

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APPENDIX.

Portion of Report and Recommended Order of Joint Board No. 47 Adopted by the Interstate Commerce Commission, Division 3, as Its Own in Svensson Freight Lines — Purchase — Haywood Washum, 104 M.C.C. 838 at 848-851.

Svensson Freight Lines, an Arizona corporation, has been engaged as a motor common carrier in Arizona intrastate commerce, and interstate and foreign commerce, continuously for a period of years dating back prior to 1957. Until the amendment to section 206(a) (6) and (7) of the act, effective October 15, 1962, it conducted such operations under the exemption established in section 206(a) (6) (sic) of the act, and since June 5, 1963, it has conducted interstate and foreign operations under a certificate of registration issued to it in docket No. MC-96786 (Sub-No. 1), pursuant to the provisions of section 206(a) (6) and (7) of the act.

In June or July 1957, the defendant Don Washum and his cousin James Eldree Washum each purchased 50 percent of all of the issued and outstanding stock of the defendant Svensson from its previous shareholder Guss Svensson. Funds were borrowed from the First National Bank of Yuma to meet the down payment required by Guss Svensson to discharge certain pressing obligations of Svensson. The note issued by James Eldree Washum and Don Washum to the First National Bank of Yuma was consigned (sic) by the defendant Haywood Washum, father of the defendant Don Washum.

The defendant Haywood Washum and his brother Jim Washum were copartners doing business as Los

Angeles-Yuma Freight Lines. They purchased a certificate of public convenience and necessity issued in docket No. MC-14045 from one James M. Clint, which purchase was consummated on October 1, 1956. Jim Washum is the father of James Eldree Washum. On January 22, 1963, Jim Washum transferred all of his interest in Los Angeles-Yuma Freight Lines to Haywood Washum and since that date Haywood Washum has held the certificate issued in docket No. MC-14045 as a sole proprietor. At about the same time that defendant, Haywood Washum, acquired the interest of his brother in LAY, the defendant, Don Washum, acquired the stock interest of his cousin James Eldree Washum in Svensson. Thus, since on or about January 21, 1963, the certificate of LAY has been held by Haywood Washum as a sole proprietor and all of the issued and outstanding stock of Svensson has been held by his son Don Washum. Defendant Don Washum was a vice president of Svensson continuously from June or July 1957 to on or about January 21, 1963, when he became president of the corporation upon acquiring the interest of his cousin. He has continued to be president of Svensson since on or about January 21, 1963.

The LAY certificate issued in docket No. MC-14045, attached hereto as "appendix A," authorizes the transportation of general commodities, with specified exceptions, between Los Angeles, Calif., and Yuma, Ariz., including certain immediate and off-route points. The Svensson certificate of registration, attached hereto as "appendix B", authorized the transportation of general commodities between various points and places in the State of Arizona. Included within its operating authority is authority to transport truckload lots from Phoenix to Yuma, Ariz., when a

portion of the load is destined to points in Roll and the Mohawk Valley area, as described in the certificate of registration. The Mohawk Valley area and Roll are located between Phoenix and Yuma, Ariz.

Since July 1957, the defendant Svensson, has provided a continuous and regular service in the transportation of general commodities in interstate or foreign commerce between Yuma and Phoenix, Ariz., in both directions. This traffic has been handled almost exclusively in interline service with LAY. Traffic handled in interline service between Svensson and LAY has consisted predominantly of traffic originating at or destined to Los Angeles, Calif. This has resulted in a joint-line service between Phoenix, Ariz. and Los Angeles, Calif.

Since July 1957, both LAY and Svensson have utilized a joint terminal at Yuma, Ariz., for the conduct of their operations. The terminal of LAY in Los Angeles, Calif., has been utilized by it exclusively in its own operations. Svensson has continuously maintained a terminal in Phoenix, Ariz., since at least July 1957. The present joint Yuma terminal of defendants Svensson and LAY is owned by Haywood Washum and his wife though prior to 1963 Haywood Washum and his wife owned the property jointly with Jim Washum and his wife.

Both Svensson and LAY maintain a telephone listing in the Phoenix Metropolitan Classified Telephone Directory which is the same number. Svensson and LAY maintain different telephone listings in the Yuma-Winterhaven-Somerton Classified Telephone Directory, but that said directory shows the Svensson telephone number as the one to be called in Phoenix, Ariz. (sic) to reach LAY and H. L. Washum & Son. H. L. Washum & Son

is a carrier engaged in the transportation of cattle in Arizona intrastate commerce pursuant to a certificate issued to it by the Arizona Corporation Commission. A verified application for renewal of the certificate filed by Haywood Washum with the Arizona Corporation Commission on May 2, 1963, reflects that the operation is a copartnership consisting of H. L. Washum and Donald L. Washum (defendants herein).

From 1957 to the date of hearing on the Complaint herein, Svensson has conducted its operations, in part, with motor vehicle equipment leased from LAY. Where there has been sufficient traffic, through trailers owned by LAY have been utilized between Phoenix, Ariz., and Los Angeles, Calif., to provide through service, otherwise the traffic has been rehandled at the Yuma joint terminal facility. Ninety-five percent of the traffic interlined by LAY at Yuma, Ariz., has been with Svensson, and pickups and deliveries have been and are made in the Yuma area interchangeably with the pick-up and delivery equipment of each depending upon their respective operating convenience. Svensson and LAY have maintained a single teletype system between Phoenix, Ariz., and Los Angeles, Calif., with teletype facilities also at Yuma, Ariz., in their joint terminal. At all times since August 26, 1957, the defendants Svensson and LAY (including the prior partnership of Haywood Washum and Jim Washum) have maintained a master policy of insurance covering the operations of Svensson, LAY, and H. L. Washum & Son (including the predecessor partnership Washum Brothers). Don Washum and his father Haywood Washum have utilized one desk at Yuma, Ariz., for the conduct of the operations of Svensson and LAY though each have separately employed office and dock personnel. Since approximately 1957 Svensson and LAY have maintained joint through rates in the tariffs of the Interstate Freight Carriers' Conference on traffic moving between Los Angeles, Calif., and Phoenix, Ariz., and various intermediate and off-route points. Also, both Svensson and LAY, for a number of years, have utilized common shop facilities at their joint terminal in Yuma, Ariz.

On February 4, 1963, the defendant Svensson filed a BOR-99 Application with the Commission, verified by the defendant Don Washum, as its president, for a "grandfather" certificate or registration in docket No. MC-96784 (Sub-No. 1). The appendix "A" to the BOR-99 Application listed one Verlan Lee as vice president of Svensson. Verlan Lee now serves as the dock foreman of LAY though he continues to be the vice president of Svensson.

On January 12, 1964, the defendant Don Washum addressed a letter to a Los Angeles law firm offering to dispose of the Svensson and LAY operations and operating properties. The letter is on the stationery of Washum Brothers and Los Angeles-Yuma Freight Lines. The second paragraph thereof is particularly pertinent to the within Complaint Proceeding. It reads as follows:

> "We have a combination of companies which is now serving points between Los Angeles and Phoenix, Ariz. This consists of 'Washum Bros,' a cattle company, 'Los Angeles-Yuma Freight Lines' and 'Svensson Freight Lines.' LA-Yuma has two California Intrastate Permits and it's ICC Permit serving LA to Yuma and all intermediate points including Calexico, California. Svensson is an intrastate carrier with ICC Registrations serving points between Yuma & Phoenix."

FILED
NOV 17 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

DONALD L. WASHUM, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION TO AFFIRM

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-280

DONALD L. WASHUM, ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

MOTION TO AFFIRM

Pursuant to Rule 16 of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. App. A) dismissing two related actions to set aside orders of the Interstate Commerce Commission (J.S. Apps. B and C). The Commission's orders denied the application of

appellant Svensson Freight Lines for a certificate of public convenience and necessity and that of appellant Donald L. Washum, owner of Svensson, for authority under Section 5 of the Interstate Commerce Act, 49 U.S.C. 5, to control Los Angeles-Yuma Freight Lines.[1]

Under Section 206(a)(7) of the Interstate Commerce Act, 49 U.S.C. 306(a)(7), the Commission may issue, to certain intrastate motor carriers who were, as of October 1962, lawfully engaged in interstate commerce under a prior exemption from normal certification requirements, a certificate of registration authorizing them to continue to engage in such interstate transportation. A certificate of registration may be issued, however, only if the carrier is not controlled by, does not control, and is not under common control with a carrier operating in another state, and the certificate is valid only so long as that condition remains satisfied.

In June 1964, the Commission issued a certificate of registration to appellant Svensson Freight Lines under Section 206(a)(7) (J.S. App. 3b). Two years later, several competing motor carriers filed a complaint with the Commission alleging that Svensson was affiliated with Los Angeles-Yuma Freight Lines, a multi-state carrier (*ibid.*). After hearings, the Commission found that the two carriers had been under common control since 1957 (*id.* at 3b-4b). It accordingly ruled that the certificate of registration

[1] Los Angeles-Yuma Freight Lines is the business name of appellant Haywood L. Washum, who is Donald Washum's father (J.S. App. 2a-3a.)

issued in 1964 "was improvidently issued * * * and has been invalid since that date" (*id.* at 3e), and it ordered Svensson to cease and desist from engaging in interstate commerce (*ibid.*).[2]

A three-judge district court thereafter dismissed a complaint seeking review of the Commission's order (299 F. Supp. 712; J.S. App. D), and this Court summarily affirmed on October 27, 1969 (396 U.S. 18).

2. While the first appeal was pending before this Court, Svensson filed a renewed application for a certificate of convenience and necessity and an application for temporary authority to continue its operations pending determination of the application for permanent authority. The Commission granted the temporary authority, but, after hearings, denied the application for a certificate of convenience and necessity on the grounds that Svensson was unfit and that the evidence failed to establish that the proposed operations were required by the public convenience and necessity (J.S. App. B).

The Commission found that, after this Court's affirmance of the prior cease and desist order in October 1969, "Svensson continued operations until January 15, 1970, without authority * * * despite the advice of counsel * * * in willful and flagrant vio-

[2] At the same time, the Commission denied Svensson's applications for authority to control Los Angeles-Yuma and for a certificate of convenience and necessity authorizing it to continue the interstate transportation it had performed under the certificate of registration (J.S. App. 3e).

lation of the orders of this Commission and the courts" (*id.* at 5b); that the "past willful misconduct does not stand as an isolated incident but fits into a larger and continuing pattern of violations of regulatory requirements that have occurred over a number of years and in the face of court orders" (*id.* at 8b); and that "[t]here is nothing on this record to suggest that this flagrantly unlawful type of conduct will not occur, if not continue, in the future" (*ibid.*).

The Commission did not view the past willful misconduct as "a per se bar to a grant" (*id.* at 7b), but rather considered it "as an 'element in assessing' [the applicants'] 'present and prospective fitness'" (*id.* at 8b). It stated (*ibid.*; emphasis in original):

> Under certain limited circumstances, we conceivably could grant an application, despite a record of willful misconduct, where an *overriding* public need has been demonstrated for a proposed service. This would involve a finding that our denial of an application would be tantamount to punishing the public by cutting off such a service. However, such a finding cannot be made in the case under review.

The Commission thereafter denied a petition for reconsideration (J.S. App. C) and a petition for rehearing (see J.S. App. 2a).

3. Appellants filed complaints seeking review of the Commission's orders, and the three-judge district court dismissed the actions (J.S. App. A). The court held that appellants' collateral attack upon the Commission's 1968 order invalidating the improvidently issued certificate of registration was barred by *res judicata* (J.S. App. 4a-5a), that the Commission's findings concerning Svensson's fitness were supported by substantial evidence (*id.* at 5a), and that the Commission adequately considered evidence concerning Svensson's operations under its temporary authority (*id.* at 6a).

ARGUMENT

The decision of the district court is correct, and the appeal presents no issue warranting plenary review.

1. Appellants' principal contention (J.S. 6-10) is that the Commission's 1968 order was improperly issued because the Commission failed to comply with Section 212(a) of the Act, 49 U.S.C. 312(a), which provides that a certificate may be revoked "for willful failure to comply" with applicable laws or regulations. The argument appears to be that, since the Commission's 1968 order was improper, the Commission could not properly take into account in the present proceedings Svensson's flagrant and willful violation of that order.

As the district court correctly held, however, this collateral attack on the 1968 order (which was upheld by a three-judge district court and by this Court on appeal) is barred by the doctrine of *res judicata*. Although appellants assert that they did not make their present contention in the prior administrative and judicial proceedings and therefore that the doc-

trine of collateral estoppel does not foreclose the present litigation, that contention rests on the erroneous premise that the present attack on the Commission's 1968 order is a "different cause of action" (J.S. 12; emphasis omitted) and therefore that the merger and bar effects of *res judicata* are inapplicable.

The fact is that the "causes of action," though perhaps different in form, are identical in substance. Both attack the validity of the same Commission order. It is settled that "a judgment upon the merits in one suit is *res judicata* in another where the parties and subject matter are the same, not only as respects matters actually presented to sustain or defeat the right asserted, but also as respects any other available matter which might have been presented to that end" (*Grubb* v. *Public Utilities Commission*, 281 U.S. 470, 479). As in *Grubb*, "[t]he thing presented for adjudication in the [prior proceeding] * * * was the validity of the [administrative] order, and it was incumbent on the appellant to present in support of his asserted right of attack every available ground of which he had knowledge"; appellants were "not at liberty to prosecute that right by piecemeal, as by presenting a part only of the available grounds and reserving others for another suit, if failing in that" (*id.* at 478-479).

It follows that the Commission's 1968 order, whether proper or improper, is not subject to attack "in this collateral proceeding"; "[a] direct attack in

such circumstances was the remedy" (*Callanan Road Improvement Co.* v. *United States*, 345 U.S. 507, 512).[3]

Even if appellants could properly challenge the Commission's 1968 order in the present proceeding and could establish the order's invalidity, that would not bear upon the validity of the 1972 order denying the application for a certificate of convenience and necessity. A determination now that the 1968 order was improperly issued would not excuse Svensson's flagrant violation of that order at a time when its validity had been sustained by the district court and by this Court on appeal, and it would not eliminate that misconduct as a consideration relevant to Svensson's fitness.[4]

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[3] It is no answer to say, as appellants assert (J.S. 13-15), that the Commission was without "jurisdiction" to issue its 1968 order. It is the judgment of the district court, affirmed by this Court, that bars relitigation, and appellants do not claim that the district court lacked subject matter jurisdiction to review the Commission's order. See *Walker* v. *City of Birmingham*, 388 U.S. 307.

[4] In any event, the 1968 order was properly issued. The order did not revoke a certificate within the meaning of Section 212(a) but rather declared void *ab initio* a certificate unlawfully issued. A "grandfather" certificate of registration under Section 206(a)(7)(A) could lawfully be issued, with exceptions not relevant here, only to an intrastate carrier which was "lawfully engaged in [interstate] operations * * * under the certificate exemption provisions * * * in effect immediately before October 15, 1962," and which was not under common control with any carrier operating in a different state. Since the Commission found that Svensson in

2. Appellants contend (J.S. 17-19) that the Commission, in the 1972 proceeding, erroneously refused to consider Svensson's temporary authority operations as "evidence to prove that public convenience and necessity require the carrier's services" (J.S. 17). As the district court correctly concluded, however, "[i]t is questionable that the temporary operations were material at the time the 1972 decision was rendered, and when that decision was amended [on petition for reconsideration] by Corrected Commission Order served May 8, 1974, the Commission stated [J.S. App. 2c] * * * that the newly submitted traffic report did not alter the original 1972 holding" (J.S. App. 6a).

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fact was *not* lawfully engaged in such interstate operations as of October 1962 and *was* under common control with an interstate carrier, it properly ruled that the certificate was void and there was no need to find a willful failure to comply with the law. Cf. *American Trucking Associations* v. *Frisco Transportation Co.*, 358 U.S. 133, 144-146.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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NOVEMBER 1975.

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